# MONTANA LEGISLATIVE HISTORY

Chapter 460 19 81

Bill H 794 S _____ Original bill & history ✓ C

| H. Committee on Human Services | | | S. Committee on Public Health, Welfare & Safety | | |
|---|---|---|---|---|---|
| Hearing Date(s) | 2-20 | ___C | Hearing Date(s) | 3-18 | ___C |
| | _____ | ___C | | 3-24 | ___C |
| | _____ | ___C | | _____ | ___C |
| | _____ | ___C | | _____ | ___C |
| Date Out | 2-20 | ___C | Date Out | 3-24 | |

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Did this bill originate in an interim committee? ___Yes ___No

Committee _____ Report _____

ON MOTION, 4/9, RULES SUSPENDED AND PLACED ON 3RD READING
3RD READING: 4/9, YEAS: 91; NAYS: 0

TRANSMITTED TO GOVERNOR: 4/13
ACTION: SIGNED, 4/17
CHAPTER 419

HB 791—BARDANOUVE—TO REPLACE THE COAL BOARD WITH A COMMUNITY DEVELOPMENT BOARD....
FISCAL NOTE: REQUIRED
INTRODUCED: 2/16
REFERRED TO COMMITTEE ON TAXATION: 2/16
HEARING: 3/4
HEARING: 3/12
BILL DIED IN COMMITTEE

HB 792—MENAHAN, DAILY, PAVLOVICH, ET AL—TO PROVIDE A METHOD FOR RELIEVING SEVERE ECONOMIC IMPACTS TO COMMUNITIES RESULTING FROM MAJOR INDUSTRIAL PLANT CLOSURES....
FISCAL NOTE: REQUIRED
INTRODUCED: 2/16
REFERRED TO COMMITTEE ON STATE ADMINISTRATION: 2/16
HEARING: 2/20
REPORT: DO PASS, 2/20
2ND READING: 2/23, YEAS: 54; NAYS: 38
3RD READING: 2/25, YEAS: 71; NAYS: 26

TRANSMITTED TO SENATE: 2/25
REFERRED TO COMMITTEE ON STATE ADMINISTRATION: 3/3
HEARING: 3/23
REPORT: 3/25, BE CONCURRED IN
2ND READING: 3/27, YEAS: 20; NAYS: 28
ON MOTION, 3/27, INDEFINITELY POSTPONED,
YEAS: 30; NAYS: 18
BILL KILLED IN COMMITTEE

HB 793—SUTAILY—TO DELETE TEACHING AS A QUALIFICATION REQUIREMENT FOR THE SUPERINTENDENT OF THE STATE SCHOOL FOR THE DEAF AND BLIND.
INTRODUCED: 2/16
REFERRED TO COMMITTEE ON EDUCATION: 2/16
HEARING: 2/20
BILL DIED IN COMMITTEE

HB 794—FLLERD, ET AL—TO GENERALLY REVISE THE PUBLIC HEALTH LAWS RELATING TO CLEAN INDOOR AIR....
INTRODUCED: 2/17
REFERRED TO COMMITTEE ON HUMAN SERVICES: 2/17
HEARING: 2/20
REPORT: 2/20, DO NOT PASS
MINORITY REPORT: 2/20, DO PASS
SUBSTITUTE MOTION, 2/23, THAT THE MINORITY REPORT BE ADOPTED
MOTION PASSED YEAS: 57; NAYS: 38
2ND READING: 2/25, YEAS: 56; NAYS: 41
3RD READING: 2/25, YEAS: 53; NAYS: 41

TRANSMITTED TO SENATE: 2/25
REFERRED TO COMMITTEE ON PUBLIC HEALTH: 3/3
HEARING: 3/18
REPORT: 3/26, REPORT NOT ADOPTED
ON MOTION, 3/27, PLACED ON 2ND READING, YEAS: 33; NAYS: 17

2ND READING: 3/31, YEAS: 29; NAYS: 19
ON MOTION, 3/31, RULES SUSPENDED, PLACED ON 3RD READING

RETURNED TO HOUSE: 3/31
2ND READING: 4/9 BE NOT CONCURRED IN MOTION,
MOTION FAILED, YEAS: 45; NAYS: 48
BE CONCURRED IN MOTION, 4/9, YEAS: 48; NAYS: 46
ON MOTION, 4/9, RULES SUSPENDED, PLACED ON 3RD READING.
3RD READING: 4/9, YEAS: 52; NAYS: 41

TRANSMITTED TO GOVERNOR: 4/15
ACTION: SIGNED, 4/20
CHAPTER 460

B 795--COZZENS--TO REVISE THE LAW PERTAINING TO THE INVOLUNTARY COMMITMENT OF ALCOHOLICS....
INTRODUCED: 2/17
REFERRED TO COMMITTEE ON JUDICIARY: 2/17
HEARING: 2/19
REPORT: DO PASS AS AMENDED, 2/22
ON MOTION, 2/25, TAKEN FROM 2ND READING BOARD AND PASSED TO 47TH LEGISLATIVE DAY.
BILL DIED; FAILED TO MEET TRANSMITTAL DEADLINE

B 796--MANNING--REQUIRING THE ISSUANCE OF A CERTIFICATE OF OWNERSHIP FOR CERTAIN WATERCRAFT....
INTRODUCED: 2/17
REFERRED TO COMMITTEE ON FISH & GAME: 2/17
HEARING: 2/24
REPORT: DO PASS, 2/24
2ND READING: 2/25, YEAS: 69; NAYS: 1
3RD READING: 2/25, YEAS: 98; NAYS: 0

TRANSMITTED TO SENATE: 2/25
REFERRED TO COMMITTEE ON STATE ADMINISTRATION: 3/3
HEARING: 3/23
REPORT: 3/26, ADVERSE REPORT ADOPTED,
YEAS: 41; NAYS: 5
BILL KILLED IN COMMITTEE

B 797--BENNETT, MENAHAN, ET AL--TO AUTHORIZE THE SALE BY PRESCRIPTION OF DIMETHYL SULFOXIDE (DMSO)....
INTRODUCED: 2/17
REFERRED TO COMMITTEE ON HUMAN SERVICES: 2/17
HEARING: 2/20
REPORT: DO PASS AS AMENDED, 2/21
2ND READING: 2/25 YEAS: 83; NAYS: 6
3RD READING: 2/25 YEAS: 89; NAYS: 7

TRANSMITTED TO SENATE: 2/25
REFERRED TO COMMITTEE ON PUBLIC HEALTH: 3/3
HEARING: 3/25
REPORT: 3/26, ADVERSE REPORT ADOPTED--YEAS: 29; NAYS: 17
ON MOTION, 3/27, RECONSIDERED AND PLACED ON 2ND READING
YEAS: 40; NAYS: 8
2ND READING: 3/31, YEAS: 36; NAYS: 14
ON MOTION, 3/31, YEAS: 33; NAYS: 16

RETURNED TO HOUSE: 3/31
TRANSMITTED TO GOVERNOR: 4/6

HOUSE BILL NO. 794

INTRODUCED BY Gallus Hager McGrath Conn Waldron Doz Under Anderson T. Burgess

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE THE PUBLIC HEALTH LAWS RELATING TO CLEAN INDOOR AIR; PROVIDING FOR ADDITIONAL ENFORCEMENT; PROVIDING PENALTIES; AMENDING SECTIONS 50-40-103, 50-40-104, AND 50-40-108, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 50-40-103, MCA, is amended to read:

"50-40-103. Definitions. As used in this part, the following definitions apply:

(1) "Department" means the department of health and environmental sciences provided for in Title 2, chapter 15, part 21.

(2) "Enclosed public place" means any indoor area, room, or vehicle used by the general public or serving as a place of work, including but not limited to restaurants, stores, offices, trains, buses, educational or health care facilities, auditoriums, arenas, and assembly and meeting rooms open to the public.

(3) "Establishment" means an enterprise under one roof that serves the public and for which a single person, agency, corporation, or legal entity is responsible.

(4) "Person" means an individual, partnership, corporation, association, political subdivision, or other entity.

~~(4)~~(5) "Smoking" or "to smoke" includes the act of lighting, smoking, or carrying a lighted cigar, cigarette, pipe, or any smokable product.

(6) "Smoking area" means a designated area in which smoking is permitted.

~~(5)~~(7) "Working--area" "Place of work" means an enclosed room where more than one employee works."

Section 2. Section 50-40-104, MCA, is amended to read:

"50-40-104. Designation or reservation of smoking or nonsmoking areas -- notice. (1) Except for those enclosed public places provided for in 50-40-105, the proprietor or manager of an enclosed public place shall:

(a) designate nonsmoking areas with easily readable signs; or

(b) reserve a part of the public place for nonsmokers and post easily readable signs designating a smoking area; or

(c) designate the entire area as a smoking area by posting a sign that is clearly visible to the public stating this designation.

(2) The proprietor or manager of an establishment containing enclosed public places shall post a sign in a conspicuous place at all public entrances to the

establishment stating, in a manner that can be easily read and understood, whether or not areas within the establishment have been reserved for nonsmokers."

NEW SECTION. Section 3. Stricter regulation of smoking permitted. (1) A local governmental entity may adopt local ordinances or other regulations that provide regulation of smoking that is more strict than that provided in this part.

(2) Nothing in this part prohibits proprietor groups, including but not limited to restaurant, hotel, or hospital associations, from imposing stricter regulation of smoking upon their members.

Section 4. Section 50-40-108, MCA, is amended to read:

"50-40-108. Enforcement. ~~The provisions of this part shall be supervised and enforced by the local boards of health under the direction of the department.~~ (1) The city attorney or county attorney in whose jurisdiction a violation of this part is alleged to have occurred or the attorney general shall file a complaint in the appropriate court for an injunction, a criminal penalty as provided in [section 5], or both, upon receipt of an affidavit of any person alleging a violation of this part.

(2) If the city attorney, county attorney, or attorney general fails to file a complaint as provided in subsection (1) within 30 days after receipt of an affidavit alleging a





violation of this part, a person may file a complaint seeking a civil penalty as provided in [section 5] and recover his costs and reasonable attorney's fees if he prevails."

NEW SECTION. Section 5. Penalties. (1) A person who knowingly, as defined in 45-2-101, violates the provisions of this part is guilty of a misdemeanor and is subject to a fine of not more than $25.

(2) A person who purposely, as defined in 45-2-101, violates the provisions of this part is guilty of a misdemeanor and is subject to a fine of not more than $50 for the first offense and not more than $100 for each subsequent offense.

(3) If the city or county attorney or the attorney general fails to enforce this part as provided in [section 4], a person who violates any provision of this part is subject to a civil penalty not to exceed $100.

Section 6. Codification instruction. Sections 3 and 5 are intended to be codified as an integral part of Title 50, chapter 40, part 1, and the provisions of Title 50, chapter 40, part 1, apply to sections 3 and 5.

-End-

STATUS SHEET

HUMAN SERVICES COMMITTEE

1981 Legislature

| Bill No. | Subject Matter | Date In | Sponsor | Hearing Date | Committee Action | Date Ou |
|---|---|---|---|---|---|---|
| HJR 36 | Urging the President of the U. S. to call attention to the plight of prisoners of war in any declaration concerning Veterans' Day. | 2/14 | Ellerd | 2/20 | Do Pass | 2/20 |
| HJR 35 | Urging the Governor to appoint Hispanics to boards, commissions, and advisory or policymaning bodies | 2/14 | Dozier | 2/18 7:30 p.m. | Do Pass | 2/19 |
| SB 228 | To amend laws relating to foster care by clarifying financial responsibility for payment; to require court review of placementsetc. | 2/16 | Regan | (SEE PAGE 13) | | |
| SB 212 | Providing a program of hazardous waste management separate from the nonhazardous solid waste management program in Montana. | 2/16 | Hager | (SEE PAGE 13) | | |
| HB 784 | An act to establish an Hispanic liaison within the department of Social and Rehabilitation Services. | 2/16 | Teague | 2-20 | Tabled | |
| HB 794 | An act to generally revise the public health laws relating to clean indoor air; providing for additional enforcement; penalties | 2/17 | Ellerd | 2/20 | Do Not Pass | 2/20 |

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MINUTES OF THE HUMAN SERVICES COMMITTEE
February 20, 1981

The Human Services Committee convened at 11:45 a.m. in Room 103 of the Capitol on February 20, 1981 with CHAIRMAN BUDD GOULD presiding. All members were present except REP. BARDANOUVE who was excused.

HB 794
The hearing on HB 794 was opened by REP. ELLERD, sponsor of the bill. This bill relates to clean air in public places, (regarding smoking) and enforcement of the act. He asked Vern Sloulin to explain the present status of the law.

VERNON SLOULIN, DHES, testified that posters specifying "smoking" and "no smoking" and information about the laws have been printed and distributed at a cost of about $5,000. Inspections have been made and time to explain the law also have been spent to carry out the existing bill. He stated that many owners of public establishments have refused to post signs, causing a problem in enforcing the law.

PROPONENTS:
DOUG OLSON, attorney for the DHES, said he had received a number of requests relative to the enforcement of the Montana Clean Air Act. If the Legislature intended to enforce the act, he said, this bill will help the DHES to do so. He submitted to the committee a copy of a recent article, published by the Missouri Law Review that attempts to delineate the smoking laws and ordinances throughout the country. (EXHIBIT I)

STEVE BALAZS, representing the Montana Lung Association, presented written testimony in favor of HB 794. (EXHIBIT II)

PASTOR GARY JENSEN, of Helena, who conducts non-smoking clinics throughout the state, said that complains are frequent and he felt that some way of enforcing the law was necessary. Enforcement officers have their hands tied as provisions for enforcing the law are not provided, he said. He read part of an ordinance from San Diego, which told that fines were levied. He felt that this bill was a very reasonable way to enforce the law.

JERRY LOENDORF, lobbyist for the Montana Medical Association, testified in favor of the bill.

OPPONENTS:

DON W. LARSON, Helena, lobbyist for the Montana Tavern Association, and Jorgenson's Holiday Inn, appeared in opposition to the bill, because it infringes on the rights of his customers. He said the law exempts taverns, but he has both a bar and restaurant. Some people like to eat lunch in the bar, and he said this law would prevent them from doing that. He proposed that an interpretation of DHES, which told him his bar was exempt be added to change this bill. He said that every facility has its own problems and should be inspected in regard to this law.

Bill KUNEY, manager of the Colonial Inn, in Helena, pointed out difficulties that his business would have in complying with this law. He said that his convention center area is changed from large to small rooms constantly, and that oversights in changing the non-smoking signs are likely to happen. He felt he would lose business if forced to comply with this proposed law.

BOB DURKEE, Montana Tavern Association, opposes the bill, but would concur with the amendment suggested by DON LARSON. He feels the bill would pit neighbor against neighbor, and open the door to a great many complaints to be resolved.

QUESTIONS FROM THE COMMITTEE:

REP. PAVLOVICH asked the sponsor about the fines. REP. ELLERD said he would be willing to work out any problem in that regard.

REP. KEYSER said he felt the bill allowed each city to interpret the bill individually and thought this would be a problem. REP. ELLERD said the bill was open to amendment. He also said the intent of the Clean Air Act was to let people know whether or not smoking was allowed in an area, as some people have health problems and should avoid smoke.

REP. ELLERD closed the hearing on the bill.

HJR 36.

REP. ELLERD opened the hearing on the resolution which urges the President of the United States to call attention to the plight of prisoners of war in any declaration concerning Veterans' Day.

PROPONENTS:

BO DURKEE, representing veterans, said there are still over 2,500 MIAs from the Viet Nam War. Fourteen of them have not been declared dead and the government is still trying to locate them. He hopes this resolution will help this matter.

PROPONENTS:

ROBERT FEDERICO, Billings, urged support of HJR 39.
MARGE OROZCO testified that she helped organize the Spanish Heritage week in Billings. She said that it was a success that the state could enjoy if it were proclaimed statewide.

OPPONENTS: There were none.

EXECUTIVE SESSION.

HB 794.

CHAIRMAN GOULD moved that HB 794 DO NOT PASS, stating that he felt criminal penalties should not be imposed. The motion was seconded and PASSED with REP. SWITZER, CONN, WINSLOW, NILSON and METCALF voting NO.

HB 764.

REP. NILSON MOVED for a DO PASS on HB 764. REP. METCALF MOVED the amendments be accepted by the committee. RUSS JOSEPHSON read the amendments, which added board members-at-large and included the Hospital Association people. The amendments PASSED with REP. SWITZER, PAVLOVIC and DEVLIN opposing.

REP. KEYSER MOVED an amendment as follows: Page 5, line 17, following [section 5[, insert: ", except that the EMS advisory council may not control the Montana highway patrol first-responder program." The motion was seconded and PASSED UNANIMOUSLY.

REP. METCALF MOVED that the Statement of Intent be accepted and that the bill DO PASS AS AMENDED. RUSS JOSEPHSON gave a clarification of the Statement, saying that the bill applies to more than the EMT program. The Statement of Intent was seconded and PASSED UNANIMOUSLY.

The bill as amended PASSED by a vote of 9 YES votes with 6 committee members voting NO. The NO votes were cast by REP. DEVLIN, SWITZER, PAVLOVICH, SEIFERT, SIVERTSEN and BENNETT.

HB 797.

REP. BENNETT MOVED an amendment as follows: on page 3, line 12, following: "facility," Insert: "pharmacy," and AS AMENDED DO PASS. The MOTION WAS SECONDED AND CARRIED UNANIMOUSLY.

# THE LEGAL CONFLICT BETWEEN SMOKERS AND NONSMOKERS: THE MAJESTIC VICE VERSUS THE RIGHT TO CLEAN AIR


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## I. Introduction

Ever since the First World War, cigarette smoking has been a popular habit in the United States.[1] As recently as 1966, 42% of the adults in the United States smoked,[2] and in 1978 an estimated 54 million Americans smoked 615 billion cigarettes.[3] During the last sixteen years, however, the popularity of tobacco smoking has suffered some severe jolts. In 1964, the Surgeon General determined that cigarette smoking was hazardous to the health of the smoker and proclaimed it a health hazard of sufficient magnitude to warrant remedial action.[4] The 1972 Surgeon General's report announced that cigarette smoking was not only dangerous to the smoker,

1. S. Wagner, Cigarette Country: Tobacco in American History and Politics 36-44 (1971). The ambivalent public attitude toward smoking is reflected by Mark Twain's description of smoking as "The Majestic Vice." S. Clemens, The Adventures of Tom Sawyer 114 (1963).

2. Public Health Service, U.S. Department of Health, Education and Welfare, Smoking and Health vii (1979) [hereinafter cited as 1979 Report]. The percentage has since dropped to 33%. *Id.*

3. *Id.*

4. Public Health Service, U.S. Department of Health, Education and Welfare, Smoking and Health 33 (1964) [hereinafter cited as 1964 Report].





but probably dangerous to the people around him, too.[6] The 1975 and 1979 reports confirmed this finding.[6]

As the dangers of smoking have become more understood, several measures have been taken to protect people who choose not to smoke from those who smoke: states have enacted statutes;[7] cities have passed ordinances;[8] federal legislation has been suggested and, in some cases, implemented;[9] constitutional arguments have been formulated;[10] common law protections have found new application;[11] and, familiar tort theories have been considered.[12] The purpose of this Comment is to analyze the legal conflict between smokers and nonsmokers with special emphasis upon the legal remedies that exist for the nonsmoker who cares enough about his rights to seek legal redress.

## II. Early History of the Conflict Between Smokers and Nonsmokers

Although the legal battle between smokers and nonsmokers is a recent development in many ways, in some respects it is a resurrection of an earlier crusade against smokers.[13] Restrictions on smoking reached their zenith in the United States around the turn of the century. In 1901, twelve states had statutes restricting or forbidding the sale or use of cigarettes.[14] Cigarette smoking was considered reprehensible and immoral,[15] in addition to being a fire hazard.[16] The nonsmoking statutes did not remain on the books very long, though; the fiasco of prohibition turned the public mood against such absolute prohibitions and the nonsmoking statutes were repealed simultaneously with the demise of the eighteenth amendment. By 1927, all of the statutes forbidding the sale or use of cigarettes had been repealed.[17]

Between 1927 and 1964 very few smoking laws existed. In the late sixties and throughout the seventies, however, more and more studies confirmed the danger a smoking cigarette presents to nearby nonsmokers,

5. Public Health Service, U.S. Department of Health, Education and Welfare, Smoking and Health 117-55 (1972) [hereinafter cited as 1972 Report].

6. 1979 Report, *supra* note 2, ch. 11; Public Health Service, U.S. Department of Health, Education and Welfare, The Health Consequences of Smoking: A Report to the Surgeon General (1975) [hereinafter cited as 1975 Report].

7. *See* text accompanying notes 57-120 *infra*.

8. *See* text accompanying notes 121-50 *infra*.

9. *See* text accompanying notes 136-46 *infra*.

10. *See* notes 147-88 and accompanying text *infra*.

11. *See* notes 181-200 and accompanying text *infra*.

12. *See* notes 201-74 and accompanying text *infra*.

13. *See generally* S. Wagner, note 1 *supra*; Annot., 20 A.L.R. 926 (1922).

14. Comment, *The Resurgence and Validity of Antismoking Legislation*, 7 U. Cal. D.L. Rev. 167, 169 (1974) [hereinafter cited as *Antismoking Legislation*].

15. Comment, *The Non-Smoker in Public: A Review and Analysis of Non-Smokers' Rights*, 7 San Fern. V.L. Rev. 141, 148 (1979) [hereinafter cited as *Non-Smoker*].

16. *Antismoking Legislation*, *supra* note 14, at 168.

17. S. Wagner, *supra* note 1, at 44; *Antismoking Legislation*, *supra* note 14, at 171.

and nonsmokers began asserting their right to safety. Anti-smoking statutes are appearing again,[18] although the modern statutes are significantly different from their predecessors. When the early laws were enacted, cigarette smoke had not been proven dangerous to humans.[19] Today that danger is widely recognized.[20] While the early statutes were enacted largely to enforce moral behavior and to prevent fire hazards,[21] the recent statutes are specifically designed to protect people from the health dangers of cigarette smoke.[22] Also, while the older statutes were aimed at prohibiting all cigarette smoking, modern statutes seek only to protect people in public places from the smoke of others.[23] The modern statutes, unlike the overbroad early laws,[24] are probably here to stay.

## III. Medical Evidence on the Harm of "Involuntary Smoking"

The widely recognized dangers of tobacco smoking[25] to the smoker lend credence to Horace Greeley's definition of a cigar as "a fire at one end and a fool at the other."[26] The scientific evidence on the subject is so overwhelming that courts have taken judicial notice of "the toxic nature of cigarette smoke and its well known association with emphysema, lung cancer and heart disease."[27] In 1979, cigarette smoking was the single most

18. *See* notes 50-135 and accompanying text *infra*.

19. Speculation existed, though. The Tennessee Supreme Court had this to say about cigarettes as long ago as 1900:

> We think they are not [legitimate articles of commerce] because wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether. Beyond question, their every tendency is towards the impairment of physical health and mental vigor. There is no proof in the record as to the character of cigarettes, yet their character is so well and so generally known to be that stated above that the courts are authorized to take judicial cognizance of the fact . . . .

Austin v. State, 101 Tenn. 563, 566, 48 S.W. 305, 306 (1898), *aff'd*, 179 U.S. 343 (1900).

20. *See* notes 25-49 and accompanying text *infra*.

21. *See* notes 15 & 16 and accompanying text *supra*.

22. *See* note 68 and accompanying text *infra*.

23. *See* note 135 and accompanying text *infra*.

24. Although a city ordinance entirely banning smoking in public streets because of the fire hazard was upheld in Commonwealth v. Thompson, 55 Mass. (12 Met.) 231 (1847), similar statutes were found too broad in Zion v. Behrens, 262 Ill. 510, 104 N.E. 856 (1914), and Hershberg v. Barbourville, 142 Ky. 60, 133 S.W. 985 (1911). For a lengthy discussion of early antismoking action, see *Antismoking Legislation*, *supra* note 14, at 168-75.

25. All tobacco smoking can be dangerous to involuntary smokers. (For the definition of involuntary smoking, see text accompanying note 30 *infra*.) Scientific research indicates that pipe and cigar smoke contain the same compounds found in cigarette smoke. *See generally* 1979 Report, *supra* note 2, ch. 13. When the phrase "cigarette smoking" is used in this Comment, cigars and pipes are also included.

26. S. Wagner, *supra* note 1, at 31.

27. Shimp v. New Jersey Bell Tel. Co., 145 N.J. Super. 516, 527, 368 A.2d 408, 414 (App. Div. 1976). *Accord*, 29 Am. Jur. 2d *Evidence* § 120 (1967) (citing four cases). Several legislatures have specifically recognized the danger of cigarette smoke. *See* notes 66-68 and accompanying text *infra*.



important preventable environmental factor contributing to illness, disability, and death in the United States, and health damage resulting from cigarette smoking cost the nation an estimated 27 billion dollars in medical care, absenteeism, decreased work productivity, and accidents.[28] In 1970, a public opinion poll reported that 87.5% of the population agreed with the statement: "Smoking cigarettes is harmful to health."[29] Despite the wide recognition that cigarette smoking is harmful to the smoker, less is known about the danger of involuntary smoking.

Involuntary smoking, also called passive smoking or second-hand smoking, occurs when a nonsmoker breathes air that contains the tobacco smoke of a smoker.[30] The tobacco smoke in the air comes from two sources: mainstream and sidestream smoke. Mainstream smoke is the smoke that is pulled through the cigarette by the smoker. It is filtered both by the cigarette and the lungs of the smoker. Sidestream smoke is the unfiltered smoke from the lit end of a burning cigarette, which, because of the lack of filtering, is even more dangerous to the nonsmoker than the exhaled smoke from the smoker's mouth.[31]

Only recently has involuntary smoking been recognized as a health hazard. The bombshell 1964 Surgeon General's report did not discuss involuntary smoking. The 1972 report, however, mentioned the possible hazards of involuntary smoking,[32] and the 1975 and 1979 reports contain additional findings in this regard.[33] In addition, the American College of Chest Physicians, the World Health Organization, and the World Conference on Smoking and Health have issued statements warning of the dangers of involuntary smoking.[34] The latter two organizations have recommended restrictions on smoking in public places.[35] Also, involuntary smoking has been the subject of a large number of recent articles in medical journals and other scholarly publications.[36]

28. 1979 Report, *supra* note 2, at vii.

29. *Antismoking Legislation*, *supra* note 14, at 181.

30. *See* 1979 Report, *supra* note 2, at 11-15.

31. A. Brody & B. Brody, The Legal Rights of Nonsmokers 21 (1977) [hereinafter cited as Brody]; *Non-smoker*, *supra* note 15, at 144.

32. 1972 Report, note 5 *supra*.

33. *See* note 6 and accompanying text *supra*.

34. Brody, *supra* note 31, at 14; Action On Smoking & Health, History of the War Against Smoking 1964-1978 (n.d.). Action On Smoking and Health (ASH), 2000 H. Street, N.W., Washington, D.C. 20006, is a national non-profit charitable organization dedicated to reducing "the deadly toll of smoking, and to protect[ing] the rights of nonsmokers." *Id.* ASH was formed in 1967 by attorneys, physicians, and other citizens who felt there was a need for legal action against smoking.

35. Brody, *supra* note 31, at 14.

36. The 1979 Report, note 2 *supra*, lists 85 documents relating to the dangers of involuntary smoking. Humorist Art Buchwald reports "another side to the story. Smokers believe that Involuntary Smokers are just getting a free smoke from the cigarette addict." Buchwald quotes a smoker, one Morris Phillip, as

Although the full extent of the dangers of involuntary smoking is not yet known, certain conclusions have already been stated with confidence:

1. Most healthy people in involuntary smoking situations suffer minor eye and throat irritation.[37]

2. Involuntary smoking by healthy people can cause slight deterioration in psychomotor performance, especially attentiveness and cognitive function.[38]

3. Involuntary smoking does significant harm to fetuses, infants, and children.[39]

4. People with certain heart diseases may suffer exacerbations of their symptoms as a result of involuntary smoking.[40]

5. People with certain lung diseases (*e.g.*, chronic bronchitis, emphysema) have considerable excess mortality under conditions of severe air pollution, and involuntary smoking situations can produce pollutants to a degree as high or higher than those that occur during air pollution emergencies.[41] The U.S. Public Health Service reports that there are 15½ million people with such chronic lung problems in the United States.[42]

6. Many individuals appear to be allergic to tobacco smoke.[43] Estimates range from 1.5 million to at least 34 million.[44] Symptoms vary from "eye irritation, nasal symptoms, headache, cough, wheezing, sore throat, nausea, hoarseness, dizziness, upper respiratory tract distress, choking sensation, loss of memory, lightheadedness, difficulty in concentration, depressive personality changes, double vision, short blackouts, to lesions on the skin."[45]

saying, "We primary smokers are sick and tired of being bugged by secondary smokers, particularly when they start wheezing and sneezing and having a good time at our expense." Columbia (Mo.) Tribune, July 31, 1979, at 4, col. 1.

37. 1979 REPORT, *supra* note 2, at 11-25; 1975 REPORT, *supra* note 6, at 107; *Antismoking Legislation*, *supra* note 14, at 178.

38. 1979 REPORT, *supra* note 2, at 11-34.

39. BRODY, *supra* note 31, at 33; PUBLIC HEALTH SERVICE, U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, THE SMOKING DIGEST 26 (1977) [hereinafter cited as SMOKING DIGEST].

40. 1979 REPORT, *supra* note 2, at 11-29; 1975 REPORT, *supra* note 6, at 107; SMOKING DIGEST, *supra* note 39, at 21. A recent experiment concluded that involuntary smoking is deleterious to the nonsmoker and significantly reduces small airways function. White & Froeb, *Small-Airways Dysfunction in Nonsmokers Chronically Exposed To Tobacco Smoke*, 302 NEW ENG. J. MED. 720 (1980).

41. 1979 REPORT, *supra* note 2, at 11-31; 1975 REPORT, *supra* note 6, at 105; SMOKING DIGEST, *supra* note 39, at 24-26.

42. Testimony of David P. Cook, Program Director of the American Lung Association of Western Missouri, before the Judiciary Committee of the Missouri House of Representatives (Jan. 16, 1979).

43. BRODY, *supra* note 31, at 33; SMOKING DIGEST, *supra* note 39, at 21. The 1979 REPORT, note 2 *supra*, states, "the existence of a true tobacco allergy has not been clearly established," but speculates that people allergic to other things may also be allergic to tobacco smoke. *Id.* at 11-31.

44. BRODY, *supra* note 31, at 33; Comment, *Where There's Smoke There's Ire: The Search for Legal Paths to Tobacco-Free Air*, 5 COLUM. J. ENV'T L. 62, 67 (1976) [hereinafter cited as *Ire*].

45. BRODY, *supra* note 31, at 33 (footnotes omitted).



7. Involuntary smoking may contribute to the development of serious diseases in otherwise healthy individuals.[46]

In short, the danger of cigarette smoke to nonsmokers is a significant health problem. Most healthy people experience discernible, physical irritation as a result of involuntary smoking.[47] Moreover, an exposure to involuntary smoking that causes only minor consequences to a healthy person may have a much more severe effect on children, people with allergies, or people suffering from heart or lung disease.[48] The number of people seriously affected by the smoke of other people's cigarettes may be as high as 34 million.[49]

## IV. SMOKING LEGISLATION

### A. *Public Attitude*

The recent revelations about the dangers of involuntary smoking have prompted a great deal of legislative action during the seventies. Federal, state, and local governments and agencies are heeding the growing medical evidence and the changing attitudes of the public about smoking. As awareness of the danger of smoking has increased, the attitude of people toward smokers has altered significantly. In surveys done by the Department of Health, Education, and Welfare,[50] people were asked to respond to the statement, "It is annoying to be near a person who is smoking cigarettes." Their responses:

| | *1964* | *1966* | *1970* |
|---|---|---|---|
| Agree | 44.8% | 47.4% | 58.5% |
| Disagree | 51.7% | 48.6% | 38.3% |

A 1978 survey in St. Joseph, Missouri,[51] asked the same question. Over

46. More than 3000 components of tobacco smoke have been identified, and several have been implicated in the development of specific diseases. Upwards of 90% of cigarette smoke is composed largely of a dozen gases that are hazardous to health, and the remainder is particulate matter, of which tar and nicotine are two of the best known components.
SMOKING DIGEST, *supra* note 39, at 17. Research done on laboratory animals has serious implications for human beings: a significant number of mice exposed to second-hand smoke over a two-year period developed severe bronchitis and inflammation of the bronchial tubes that connect the windpipe with the lungs; rabbits exposed to smoke from 20 cigarettes per day for two to five years developed emphysema; dogs exposed to cigarette smoke ten times per week for one year suffered a breakdown in lung tissues; rats exposed to second-hand smoke for 45 minutes a day for two to six months showed twice as many lung tumors as a control group. SECOND-HAND SMOKE—AN AMERICAN LUNG ASSOCIATION BROCHURE, *reprinted in* D. SHIMP, HOW TO PROTECT YOUR HEALTH AT WORK 115-21 (1976) [hereinafter cited as SHIMP BOOK].

47. *See* note 37 and accompanying text *supra*.

48. 1979 REPORT, *supra* note 2, at 11-29.

49. *See* note 44 and accompanying text *supra*.

50. *Antismoking Legislation*, *supra* note 14, at 181.

51. The St. Joseph Chapter of the Center for Nonsmokers' Rights conducted a 100-call random telephone survey of adults 18 years and older (Feb. 1978). Information obtained from the American Lung Association of Western Missouri, 2007 Broadway, Kansas City, Mo. 64108.

60% of the population surveyed agreed with the statement, and 40% of the smokers agreed with it.[52]

In the surveys, the people were also asked for a response to the statement: "The smoking of cigarettes should be allowed in fewer places than it is now."[53] Even in 1964, 51.2% agreed with the statement.[54] Since then, the percentage of people agreeing has steadily increased.[55] A nation-wide study conducted in 1978 for the Tobacco Institute by the Roper Organization had the following results: 62% favored separating smokers from nonsmokers at train stations, airports, and bus stations; 61% favored separation in the work place; 73% favored separation at indoor sporting events; and 71% favored separation in eating places.[56] The survey results clearly indicate that the legislator who advocates a statute restricting smoking in public has the support of a majority of Americans.

### B. *State Statutes*

As of 1980, thirty-four states and the District of Columbia have legislation restricting smoking in various places in order to reduce involuntary smoking, and one state accomplishes the same result by extensive administrative regulations.[57] The statutes restricting smoking vary greatly

52.

| | *Smokers* | *Nonsmokers* | *Combined %* |
|---|---|---|---|
| Agree | 40% | 75% | 61% |
| Disagree | 52.5% | 21.7% | 34% |
| Don't Know | 7.5% | 3.3% | 5% |

53. See notes 50 & 51 *supra*.

54. *Nonsmoking Legislation*, *supra* note 14, at 181.

55.

| | *HEW Survey* | | | *1978 St. Joseph Survey* | | |
|---|---|---|---|---|---|---|
| | *1964* | *1966* | *1970* | *Smokers* | *Non-smokers* | *Combined %* |
| Agree | 51.2% | 51.8% | 56.8% | 35% | 68.3% | 55% |
| Disagree | 38.8% | 36.8% | 36.3% | 55% | 15% | 31% |
| Don't Know | — | — | — | 10% | 16.7% | 14% |

56. Wall St. J., Oct. 25, 1979, at 5, col. 2.

57. For states enacting legislation to reduce involuntary smoking, see Groups I, II, and III below. Other states have legislation restricting smoking, enacted for reasons other than protecting nonsmokers. *See* Group IV below. A few states have no legislation restricting smoking. *See* Group V below.

GROUP I: Alaska Stat. §§ 18.35.300, .310, .320, .330, .340 (Cum. Supp. 1979); Ariz. Rev. Stat. Ann. § 36-601.01 (1974); Ark. Stat. Ann. §§ 82-3701 to -3705 (Cum. Supp. 1979); Colo. Rev. Stat. §§ 25-14-101 to -105 (Cum. Supp. 1978); Conn. Gen. Stat. Ann. § 1-21b (West Cum. Supp. 1980); Ga. Code Ann. § 26-9910 (1977); Hawaii Rev. Stat. §§ 321-201 to -206 (1976); Iowa Code §§ 98A.1-.6 (Supp. 1980); Kan. Stat. Ann. § 21-4008 (Cum. Supp. 1979); Mass. Gen. Laws Ann. ch. 270, § 21 (West Cum. Supp. 1980); Minn. Stat. Ann. §§ 144.411-.417 (West Supp. 1980); 1979 Mont. Laws ch. 368; Neb. Rev. Stat. §§ 71-5701 to -5715 (Supp. 1979); Nev. Rev. Stat. §§ 202.2490-.2492 (1975); N.H. Rev. Stat. Ann. § 155:42 (Supp. 1979); N.J. Rev. Stat. § 2C:33-13 (Supp. 1979); N.Y. Pub. Health Law §§ 1399-o to -q (McKinney Supp. 1979); N.D. Cent. Code §§ 23-12-09 to -11 (1978); Ohio Rev. Code Ann. § 379.031 (Page Supp. 1979); Okla. Stat. Ann. tit. 21, § 1247 (West Supp. 1979); R.I. Gen. Laws §§ 23-56-1, -2 (Cum. Supp. 1978); S.D. Compiled Laws Ann. §§ 22-36-1, -2 (1979); Tex. Penal Code Ann. tit. 10, § 48.01 (Vernon Supp. 1979); Utah Code Ann. §§ 76-10-101 to -110 (Cum. Supp. 1975); 218 WAC 152 (1975) (Washington state regulations).



in scope and function. Twenty-five states have a specific and fairly comprehensive statute restricting smoking in public.[58] Generally, Clean Indoor Air legislation contains the four elements that the American Lung Association has identified as common to effective anti-smoking legislation:

> 1. Definition of terms, particularly those words which have more than one connotation (*e.g.*, "public place").
>
> 2. Requirement that plainly visible signs be posted in all areas where smoking is restricted or prohibited to alert everyone to the regulations in effect.
>
> 3. Clear delegation of authority: identification of the officials and/or agencies responsible for the publicity, posting, and enforcement of the regulations.
>
> 4. Designation of penalties for violations to provide incentives for adhering to the regulations.[59]

GROUP II: Mo. Ann. Code art. 38A, § 25 (1957) (fireworks), art. 43, § 54-I (1957) (physicians' offices, nursing homes, hospitals), art. 43, § 200 (1957) (food canning), art. 78, § 55A (Supp. 1979) (buses), art. 89, § 64 (1957) (elevators); Mich. Comp. Laws §§ 333.21333 (1980) (homes for the aged), 333.21531 (1980) (hospitals), 333.21733 (1980) (nursing homes), 408.820 (Supp. 1980) (elevators), 289.707a (Supp. 1980) (retail food establishments), 333.12905 (1980) (restaurants), 289.129 (1967) (canneries); Or. Rev. Stat. §§ 243.345, .350 (1979) (state offices), 192.710 (1979) (public meetings), 441.815 (1979) (hospitals), 479.015 (1979) (elevators).

GROUP III: Cal. Health & Safety Code §§ 25940, 25940.5, 25941 to 25947 (West Supp. 1980) (certain areas in publicly owned buildings); Cal. Pub. Util. Code § 561 (West Supp. 1980) (public transportation) (California's Clean Indoor Air Act, ch. 10.7, was rejected at the general election held Nov. 7, 1978); Del. Code Ann. tit. 11, § 1326 (1979) (buses); D.C. Code Ann. § 44-216 (Supp. 1978) (public transportation); Fla. Stat. §§ 823.12 (1976) (elevators), 255.27 (Supp. 1980) (government buildings); Idaho Code §§ 18-5904 to -5906 (1979) (public meetings); Miss. Code Ann. § 97-35-1(4), (7) (1972) (buses); Pa. Stat. Ann. tit. 35, § 361 (Purdon Supp. 1980) (hospitals); Pa. Stat. Ann. tit. 53, § 3702 (Purdon 1972) (retail stores); Pa. Stat. Ann. tit. 35, § 1225 (Purdon 1977) (theatres, public assemblies); Wash. Rev. Code Ann. § 47.56.730 (Supp. 1980) (ferries).

GROUP IV: Ill. Ann. Stat. ch. 96½, § 2105 (Smith-Hurd 1979) (mines); Ill. Ann. Stat. ch. 96½, § 2013 (Smith-Hurd 1979) (magazine); Ill. Ann. Stat. ch. 127½, § 109 (Smith-Hurd Cum. Supp. 1976) (fireworks); Ind. Code Ann. §§ 16-1-22-21, 16-6-4-25 (Burns 1973) (food processed or stored); Ky. Rev. Stat. Ann. § 352.170(5) (Baldwin 1977) (mines); Ky. Rev. Stat. Ann. § 158.050 (Baldwin Cum. Supp. 1978) (school premises); La. Rev. Stat. Ann. § 17:416(A) (West Supp. 1980) (school premises); Me. Rev. Stat. Ann. tit. 25, § 2455 (1964) (mills, buses, factories, shipyards; fire prevention in mind); RSMo § 320.130 (1978) (fireworks); N.M. Stat. Ann. §§ 65-7-2, -3, 65-14-17 (1974) (mines); S.C. Code §§ 23-35-90, -100 (1976) (fireworks); S.C. Code § 59-67-150 (1976) (school bus); Tenn. Code Ann. § 53-3011 (1977) (fireworks); Tenn. Code Ann. §§ 59-6-103(b), 09(j), -510(a), -7-106 (1980) (mines); Tenn. Code Ann. § 59-7-108(h) (1980) (magazine); Vt. Stat. Ann. tit. 20, § 2752 (1968) (building with sign posted; fire prevention measure); Va. Code § 3.1-379 (1973) (food processing); Va. Code § 45.1-99 (1974) (magazines); Va. Code § 45.1-98 (1974 & Cum. Supp. 1979) (mines); W. Va. Code § 21-3-8 (1978) (factories, mercantile establishments); W. Va. Code § 16-9-7 (1979) (schools); W. Va. Code § 22-2-57(b) (1978) (mines); W. Va. Code § 22-2-55 (1978) (mine surface); Wyo. Stat. § 30-6-107 (1977) (mines).

GROUP V: Alabama, North Carolina, and Wisconsin.

58. Group I, note 57 *supra*.

59. Smoking Digest, *supra* note 39, at 85.

Three states have a group of statutes, rather than one single comprehensive statute, which limit the places where smoking may occur.[60] In effect, these statutes are probably just as comprehensive as those in most single-statute states. Seven states and the District of Columbia have statutes for protection of nonsmokers that only prohibit smoking in a particular public place.[61] These statutes typically mention only buses or elevators, although some proscribe smoking in certain public meetings, government buildings, retail stores, or hospitals. Thirteen states have statutes prohibiting smoking in certain areas, not because of the air pollution danger to nonsmokers, but because of fire hazards, food contamination, or restrictions on smoking by children at school.[62] Three states have no statutes prohibiting smoking.[63]

All twenty-five comprehensive anti-smoking statutes were enacted since 1974. The first state to pass a comprehensive law prohibiting smoking in designated public places was Arizona.[64] The most recent was Connecticut, where the Connecticut Clean Indoor Air Act went into effect October 1, 1979.[65] The comprehensive statutes vary greatly in detail, but many of them contain similar characteristics.

Several state statutes declare in a preamble that smoking is a health hazard[66] or a public nuisance.[67] A few legislatures have gone even further in stating the statutory purpose, saying that the statute is meant to protect the right of the nonsmoker to breathe clean air.[68] Such a statement of

60. Group II, note 57 *supra*.
61. Group III, note 57 *supra*.
62. Group IV, note 57 *supra*.
63. Group V, note 57 *supra*.
64. ACTION ON SMOKING & HEALTH, HISTORY OF THE WAR AGAINST SMOKING 1964-1978 (n.d.).
65. AMERICAN LUNG ASSOCIATION OF WESTERN MISSOURI, SMOKING AND HEALTH REPORT (Sept. 1979). In Missouri, the Missouri Clean Indoor Air Act passed out of the Interstate Committee with a 3-2-1 vote in January 1980. The bill, however, died on the Perfection Calendar.
66. *See* laws from Arizona, Arkansas, California, Colorado, Minnesota, Nebraska, Nevada, Oklahoma, Oregon, Rhode Island, and Washington, cited note 57 *supra*.
67. *See* laws from Alaska, Arizona, Oklahoma, Rhode Island, South Dakota (statute listed under heading Public Nuisance), and Idaho (statute listed under heading Public Nuisance), cited note 57 *supra*.
68. ARK. STAT. ANN. § 82-5701 (Cum. Supp. 1979) provides:
> Information available to the General Assembly based upon scientific research data has shown that nonsmokers often receive damage to their health from the smoking of tobacco by others. It is therefore declared to be the public policy of the state of Arkansas that the rights of nonsmokers be protected in the manner provided in this Act.

The Rhode Island "Smoking in Public Places" statute, R.I. GEN. LAWS § 23-56-1 (Cum. Supp. 1978), has a similar preamble:
> The use of tobacco for smoking purposes is being found to be increasingly dangerous, not only to the person smoking but also to the non-smoking person who is required to breathe such contaminated air. The most pervasive intrusion of the non-smoker's right to unpolluted air space is the uncontrolled smoking in public places. The legislature intends, by the enactment of this chapter, to protect the health and atmospheric environment of the non-smoker by regulating smoking in certain public places.



legislative intent and purpose seems to be a good idea. A statute restricting smoking might have been enacted for any of several reasons, including the protection of air, the protection of food, the protection of the community from fire, or the protection of the morals of minors.[69] Situations could arise where the intent of the legislature would be significant, and in such a situation it helps to have the intent clearly spelled out.

A preamble stating that the legislature recognizes the dangers of involuntary smoking might also be useful for educational and public policy reasons. Since the dangers of involuntary smoking have only become publicized during the seventies and many skeptics still exist,[70] formal recognition of the danger by a state legislature that has heard the evidence can only serve to help the public by further educating them on the issue. Moreover, use of the words "rights of the nonsmoker" emphasizes that nonsmokers *do* have the right to breathe clean air.[71]

The definition given smoking in nonsmokers' rights legislation is important. Many states use the definition: "Smoking in a place or vehicle includes the possession, in that place or vehicle, of a lighted cigarette, cigarillo, cigar, or pipe."[72] Several statutes include the additional phrase, "or any other lighted smoking equipment."[73] Under this phrasing, any newly developed tobacco product that is not necessarily a cigarette, cigarillo, cigar, or pipe would still be covered.[74]

The designation of *where* smoking is prohibited is one of the most important parts of the Clean Indoor Air legislation. A few states prohibit smoking in all indoor public places not designated as smoking areas.[75] Representative of these statutes is Montana's definition of "indoor public place" as "any indoor area, room, or vehicle used by the general public or serving as a place of work, *including but not limited to* restaurants, stores, offices, trains, buses, educational or health care facilities, auditoriums, arenas, assembly and meeting rooms."[76] This seems a much more efficient statute than one that attempts to list all of the various indoor public places where smoking is prohibited. Since involuntary smoking is dangerous to nonsmokers, it seems better public policy to start with the presumption that smoking is *not* allowed in *any* indoor public place, and then provide

69. BRODY, *supra* note 31, at 151.
70. *See* note 131 and accompanying text *infra*.
71. For the argument that the right to breathe clean air is a fundamental right protected by the Constitution, see notes 147-83 and accompanying text *infra*.
72. *E.g.*, IOWA CODE § 98A.1 (Supp. 1980).
73. *E.g.*, MINN. STAT. ANN. § 144.415 (West Supp. 1980).
74. Professor Alvan Brody drafted a model statute with a slightly different definition: "'Smoking' means carrying or possessing any lighted tobacco product, except temporarily possessing a tobacco product lighted by another for purposes of immediate extinguishment." BRODY, *supra* note 31, at 167.
75. *See* laws from Colorado, Minnesota, Montana, Nebraska, New Jersey, and Utah, cited note 57 *supra*.
76. 1979 Mont. Laws ch. 368, § 3(2) (emphasis added).

specific smoking areas, than to start with the presumption that smoking is allowed, except in certain forbidden places.[77]

In the statutes that list places where smoking is prohibited, some areas are listed more frequently than others: twenty-four states and the District of Columbia prohibit smoking in public transportation;[78] twenty-four prohibit smoking in elevators;[79] twenty-three prohibit smoking in public waiting rooms or various other parts of health care facilities;[80] twenty-one prohibit smoking in places of recreation or entertainment, like libraries, museums, theaters, lecture or concert halls, auditoriums, or swimming pools;[81] fifteen prohibit smoking in public schools;[82] twelve prohibit smoking in state-owned buildings;[83] eleven prohibit smoking in public meetings;[84] nine restrict smoking in restaurants;[85] seven prohibit smoking in supermarkets or food stores;[86] six prohibit smoking in public department stores;[87] six prohibit or restrict smoking in any place where the proprietor has posted a "No Smoking" sign;[88] and six prohibit smoking in *any* public place "including but not limited to" a list of specified places.[89]

77. "Model legislation should ban smoking everywhere nonsmokers have a legal right to be. The burden should be on the smoker to discover where smoking is permitted." Brody, *supra* note 31, at 106.

78. *See* laws from Alaska, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Iowa, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Utah, and Washington, cited note 57 *supra*.

79. *See* laws from Alaska, Arizona, Colorado, Connecticut, Florida, Georgia, Hawaii, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, and Washington, cited note 57 *supra*.

80. *See* laws from Alaska, Arizona, Arkansas, Colorado, Connecticut, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, and Washington, cited note 57 *supra*.

81. *See* laws from Alaska, Arizona, Colorado, Hawaii, Iowa, Kansas, Massachusetts, Minnesota, Nebraska, Nevada, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, and Washington, cited note 57 *supra*.

82. *See* laws from Alaska, Arizona, California, Colorado, Connecticut, Kentucky, Louisiana, Minnesota, Nebraska, North Dakota, Ohio, Rhode Island, South Dakota, Texas, and Washington, cited note 57 *supra*.

83. *See* laws from California, Colorado, Connecticut, Florida, Iowa, Minnesota, Nebraska, Nevada, North Dakota, Ohio, Oregon, and Utah, cited note 57 *supra*.

84. *See* laws from Alaska, Colorado, Connecticut, Hawaii, Idaho, Minnesota, Nebraska, Nevada, Oregon, Utah, and Washington, cited note 57 *supra*.

85. *See* laws from Colorado, Connecticut, Michigan, Minnesota, Montana, North Dakota, Ohio, Nebraska, and Utah, cited note 57 *supra*.

86. *See* laws from California, Connecticut, Massachusetts, Michigan, Minnesota, Nebraska, and Rhode Island, cited note 57 *supra*.

87. *See* laws from Colorado, Minnesota, Nebraska, Pennsylvania, Utah, and Washington, cited note 57 *supra*.

88. *See* laws from Alaska, Arizona, Georgia, New Hampshire, New Jersey, and Utah, cited note 57 *supra*.

89. *See* note 75 *supra*.



Most of the specifically named no-smoking areas share the characteristic of being a public place where many people are gathered closely together. Buses, elevators, waiting rooms, theaters, classrooms, and public meeting halls are all viewed as places where if one person smokes, everyone smokes, whether they hold the cigarette or not. These are the most obvious places where smoking should be prohibited.

Another obvious place where smoking should be prohibited is the health care facility. Because people who suffer heart and lung disease have been proven to be the most susceptible to immediate injury from exposure to cigarette smoke,[90] smoking should clearly be prohibited in the places where the sick have gone to seek medical assistance.

An often overlooked place where smoking should be prohibited or restricted is the workplace. Only at the workplace is the nonsmoker required to spend eight hours per day at his assigned spot. If the spot is next to a smoker, the nonsmoker will probably experience some discomfort or even illness.[91] Many companies have voluntarily prohibited smoking in the workplace.[92] Several offer bonuses to employees who stop smoking.[93] Other companies, however, may prefer to irritate the nonsmokers than the smokers.[94] The statutes in Colorado,[95] Minnesota,[96] Montana,[97] Nebraska,[98] Oregon,[99] and Utah[100] contain sections specifically dealing with smoking in the workplace.

The Minnesota, Montana, Nebraska, and Utah statutes specify enclosed indoor areas "serving as a place of work" as areas where smoking is prohibited. The Minnesota statute is representative. It states that "the department of labor and industry shall, in consultation with the state board of health, establish rules to restrict or prohibit smoking in those places of work where the close proximation of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of non-

90. *See* notes 40-45 and accompanying text *supra*.

91. A recent study indicates that 70% of nonsmokers who are not allergic to tobacco smoke suffer eye irritation when exposed to tobacco smoke. Of nonsmokers with allergies, 73% suffer eye irritation. The figures for nasal irritation are 29% and 67%, respectively. *See Antismoking Legislation*, *supra* note 14, at 178.

92. J.C. Penney, N.L.T. Corp., and Continental Illinois Bank separate smokers from nonsmokers. Shimp Book, *supra* note 46, at 5. Thomas Edison refused to hire smokers. S. Wagner, *supra* note 1, at 42.

93. Cybertek Computer Products, Inc., of Los Angeles, Intermatic Inc., of Spring Grove, Ill., and Speed Call Corp., of Hayward, Cal., all pay their employees not to smoke at work. Action On Smoking and Health, ASH Newsletter (Jan.-Feb. 1980).

94. Professor Alfred W. Blumrosen has suggested that a company might take this approach out of inertia. Shimp Book, *supra* note 46, at 42.

95. Colo. Rev. Stat. § 25-14-102 (Cum. Supp. 1978).

96. Minn. Stat. Ann. § 144.415 (West Supp. 1980).

97. 1979 Mont. Laws ch. 368, § 3(2).

98. Neb. Rev. Stat. § 71-5701 (Supp. 1979).

99. Or. Rev. Stat. § 243.550 (1979). The Oregon statute restricting smoking in the workplace only applies to places of employment operated by the state of Oregon.

100. Utah Code Ann. § 76-10-101 (Cum. Supp. 1978).

smoking employees."[101] Although involuntary smoking bothers some nonsmokers less than others, it is important for courts interpreting "comfort" to be familiar with the evidence that involuntary smoking causes at least physical discomfort to the *majority* of its victims.[102]

One key feature of the legislation restricting smoking in the workplace is an exception for enclosed offices occupied exclusively by smokers.[103] Under this exception, a private, enclosed office occupied exclusively by smokers, even if visited by nonsmokers, is not considered a public place for purposes of the statute. Without this provision, a law prohibiting smoking in the workplace could have the unintended effect of prohibiting smoking in the confines of one's private office.

Some statutes restricting smoking include a provision to the effect that existing physical barriers and ventilation systems shall be used to minimize the toxic effect of smoking in adjacent nonsmoking areas.[104] The wisdom of this provision is debatable. Existing partitions and ventilation systems may be ineffective in preventing potentially harmful amounts of smoke[105] from drifting into the nonsmokers' areas. On the other hand, achieving absolute separation by requiring solid walls and new ventilation systems could be inordinately costly for many businesses and organizations. The legislatures evidently have balanced these considerations and have decided the large cost outweighs the questionable harm. Steps should be taken, however, to ensure that new buildings are designed to protect nonsmokers from the outset. Also, government and private bodies large enough to afford the cost should be encouraged to make structural changes necessary to provide the maximum protection immediately.

Many of the Clean Air statutes require "No Smoking" signs in certain situations.[106] These requirements serve several functions: proprietors who might not do so voluntarily are forced to put up the signs; many smokers notice the signs and presumably obey them; and the people who smoke in spite of the signs have at least been warned that smoking is prohibited in the particular area.

Another important provision of the Clean Air legislation is the section delegating authority for enforcement and implementation. In Minnesota, for example, the State Commissioner of Health is charged with the responsibility of adopting regulations to implement the statute.[107] The commissioner, a local board of health, and any affected party are specifically given the authority to institute injunctive action.[108] Other statutes go into less

101. MINN. STAT. ANN. § 144.414 (West Supp. 1980).
102. *See* notes 37-49 and accompanying text *supra*.
103. *E.g.*, MINN. STAT. ANN. § 144.415 (West Supp. 1980).
104. *See* NEB. REV. STAT. § 71-5708 (Supp. 1979).
105. The smoke from one cigarette smoked in four minutes in a room the size of a typical office can produce 36 times the amount of tar particulates considered safe by federal standards. *Ire*, *supra* note 44, at 66.
106. *E.g.*, MINN. STAT. ANN. § 144.416 (West Supp. 1980).
107. MINN. STAT. ANN. § 144.417 (West Supp. 1980).
108. *Id.*



detail, simply saying the provisions of the act shall be supervised and enforced by local health boards.[109] Many state legislatures have neglected to include any such provision.

The penalty provisions in the various nonsmokers' rights statutes differ significantly, though none are as severe as Tsar Michael's penalties of torture or exile for persons violating his rule against the sale or use of tobacco.[110] The stiffest penalties in the United States are in Minnesota, where the offending smoker is subject to a fine of up to five hundred dollars, or a jail sentence of up to ninety days.[111] The least severe penalties are in Colorado and Massachusetts, which have no penalty provisions at all.[112] Typical penalties in other states are fines of "not more than two hundred dollars,"[113] "ten to one hundred dollars,"[114] or as low as five dollars.[115] Since the purpose of the nonsmoking statutes is to protect the health of nonsmokers, the stiffer penalties seem justified; the penalty ought to be at least high enough to deter violations.

Some statutes penalize not only the smoker, but the proprietor, or person in control of the area, for breach of his duty to protect nonsmokers.[116] In order to justify punishment at this level, the statutes first create a duty. For example, the Minnesota statute states that the proprietor or other person in charge of a public place shall make reasonable efforts to prevent smoking by: (1) posting "No Smoking" signs; (2) arranging separate smoking and no-smoking areas; (3) requesting smokers violating the law to cease; or (4) by other appropriate means.[117] Several states inflict a higher penalty on proprietors who have failed to stop the smoker than on the smoker himself.[118] A proprietor who faces a potential $500 fine for his failure to act has a strong incentive to take affirmative action to stop smoking in no smoking areas.

Another statutory remedy available to the nonsmoker in some states is the injunction. Minnesota law specifically allows an injunction to be sought by the State Commissioner of Health, a local board of health, or any affected party.[119] Even in states where injunctive relief is not expressly allowed by statute, it might be available under common law theories.[120]

109. 1979 Mont. Laws ch. 368, § 8.
110. S. WAGNER, *supra* note 1, at 12.
111. MINN STAT. ANN. § 609.03(3) (West Supp. 1980). Utah also has a stiff penalty, providing for a fine of up to $299 and a jail sentence not exceeding 90 days. UTAH CODE ANN. §§ 76-3-204, -205, -301, -10-110 (1978).
112. COLO. REV. STAT. §§ 25-14-101 to -105 (Cum. Supp. 1978); MASS. GEN. LAWS ANN. ch. 270, § 21 (West Cum. Supp. 1980).
113. *E.g.*, N.J. REV. STAT. § 2C:33-13 (Supp. 1979).
114. *E.g.*, ARK. STAT. ANN. § 82-3703 (Cum. Supp. 1979).
115. *E.g.*, IOWA CODE § 98A.6 (Supp. 1980) ($5 for the first violation, $10 to $100 for each subsequent violation).
116. *See* laws from Alaska, Connecticut, Iowa, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, and Utah, cited note 57 *supra*.
117. MINN. STAT. ANN. § 144.416 (West Supp. 1980).
118. *See* laws from Alaska, North Dakota, and Utah, cited note 57 *supra*.
119. MINN. STAT. ANN. § 144.417 (West Supp. 1980).
120. *See* notes 184-200 and accompanying text *infra*.

In addition to the many state laws concerning involuntary smoking, several local ordinances are on the books. Chicago has a special "smokers' court," the Public Safety Court, set up in 1975 to prosecute violators of the ban on smoking in public places.[121] New York City and Cincinnati have ordinances prohibiting smoking;[122] Kansas City has ordinances prohibiting smoking on buses and in stores;[123] and St. Louis has ordinances prohibiting smoking on buses, on street cars, in the multi-sports arena, and in motion picture projection booths.[124]

Although many state and local measures exist, the enforcement of these laws has had uneven success. In Florida in 1976, a man was convicted and fined $250 for smoking in an elevator.[125] A nonsmoker with a chronic bronchial asthma condition had been in the elevator with the smoker and, pointing to the "No Smoking by Law" sign, had asked that he stop smoking. The man declared that he had enough money to pay a fine and he blew smoke into the face of the nonsmoker. The nonsmoker filed a complaint, and the smoker became the first person ever to be convicted and fined for smoking in an elevator.[126] In Minnesota in 1976, George McKeever, a 70-year-old man, was convicted under the Minnesota Clean Indoor Air Act and fined $10.[127] The judge, who did not approve of the Minnesota law, suspended the minimum fine and dismissed the old man with the gentle rebuke, "Go and sin no more."[128] The result of the McKeever case may have been affected by factual questions of whether the old man's pipe had been lit, and whether the nonsmoker had banged him in the leg with her shopping cart. A survey conducted by the *Minnesota Tribune* in June 1978 indicated that 75% of Minnesota nonsmokers and 70% of Minnesota smokers favored strict enforcement of the Minnesota law.[129] New York City has evidently been very effective in handling violations of its nonsmoking ordinance. The statistics as of March 1975 revealed an 88% conviction rate.[130]

One recent commentator has criticized laws that make smoking in indoor public places a crime as being the enforcement of moral condemnation through the criminal law.[131] Dismissing the evidence that involuntary smoking is harmful to nonsmokers, the commentator equates nonsmokers' rights legislation with laws concerning littering, dogs misbehaving on public grass, and people playing their loud radios on the public bus.[132] The major fallacy in this analysis is the non-recognition of the fact that involuntary smoking *is* dangerous.[133] Unlike laws regulating morality, Clean Air statutes are health measures, just as are laws penalizing drunk driving. A statute prohibiting the consumption of alcoholic beverages would clearly constitute government enforcement of moral judgments. A statute prohibiting *driving* while intoxicated, however, is obviously designed to protect the health and safety of other members of society. In the same way, modern Clean Air legislation is not enacted to prohibit smokers from smoking, as the old statutes were,[134] but to prohibit them from smoking *in public places where their smoke might harm other members of the public.*[135]

Another criticism of Clean Air legislation is the argument that if nonsmokers are the majority of the population, and if they are bothered or injured by cigarette smoke, they will stay away from public places where smoking is allowed, and the ensuing economic pressure will force proprietors to provide nonsmoking areas, without undesirable arm-twisting by the government. The answer to this argument is that this problem is a health issue, not an economic issue. Laws regarding the safety of food and the safety of transportation exist. Laws regarding the safety of the air seem equally important. In addition, common sense dictates that the nonsmoker should not be forced to stay away from public places out of fear for his health; rather, the smoker should be restricted to practicing his habit in places where innocent bystanders will not be injured.

### C. *Federal Actions*

Nonsmokers currently receive some protection from federal legislation and regulations. The legislative protection has, to this point, been indirect. Since 1965, the federal government has required each package of cigarettes to bear a label warning of the dangers of cigarette smoking.[136] Since 1971, cigarette commercials have been banned from television and radio.[137] These measures may have helped the nonsmoker by reducing the percentage of the population that smokes, thereby reducing the exposure of the nonsmoker

121. BRODY, *supra* note 31, at 105 (803 arrest citations were issued in 1975 for violations); SMOKING DIGEST, *supra* note 39, at 84; 7 STUDENT LAW. 15, 56 (Mar. 1979).
122. SMOKING DIGEST, *supra* note 39, at 84.
123. KANSAS CITY, MO., CODE OF GENERAL ORDINANCES §§ 26.43, .41 (1967).
124. ST. LOUIS, MO., REVISED CODE §§ 716.060(16), 792.010, 811.010 (1960).
125. GOOD HOUSEKEEPING, Apr. 1979, at 118.
126. *Id.* at 120.
127. 7 STUDENT LAW. 15, 58 (Mar. 1979).
128. *Id.* Prosecutions under the Minnesota Clean Indoor Air Act reportedly have decreased since the McKeever case. *Id.*
129. AMERICAN LUNG ASSOCIATION OF WESTERN MISSOURI, SMOKING AND HEALTH REPORT (Apr.-May 1979).
130. BRODY, *supra* note 31, at 105.
131. 7 STUDENT LAW. 15, 56-58 (Mar. 1979).
132. *Id.* at 16.
133. The author reports that *only* 34 million people are allergic to tobacco smoke, evidently considering that to be an insignificant number. *Id.* at 17.
134. *See* notes 14-16 and accompanying text *supra*.
135. *See* BRODY, *supra* note 31, at 112; *Nonsmoker*, *supra* note 15, at 168. In a recent case, the Virginia Supreme Court said that ordinances restricting smoking in public places are "clearly within the police power of the legislature." Alford v. City of Newport News, 260 S.E.2d 241, 243 (Va. 1979).
136. 15 U.S.C. § 1333 (1976).
137. 15 U.S.C. § 1335 (1976).

to tobacco smoke. Federal legislation that would directly protect nonsmokers, however, has been suggested,[138] but not passed.

Several federal regulations offer direct protection to nonsmokers. The Department of Defense (D.O.D.) has a comprehensive regulation prohibiting smoking in auditoriums, elevators, shuttle vehicles, medical care facilities, conference and class rooms, and work areas.[139] The regulation also requires nonsmoking areas to be designated in D.O.D. eating facilities. The General Services Administration has a similar regulation, which became effective in April 1979.[140] The Interstate Commerce Commission has a regulation limiting the smoking section of a bus, when such a section is provided at all, to the back thirty percent of the seats.[141] A Civil Aeronautics Board regulation requires passenger aircraft to provide a "No Smoking" area large enough to include all passengers who want it.[142] Smoking is also prohibited in trains, except in designated areas.[143]

Expansion of federal legislation and regulation would have both advantages and disadvantages. One advantage of a federal "Clean Indoor Air Act" would be more nationwide uniformity. One of the problems with enforcement of no-smoking legislation has been "the patchwork quality of such legislation."[144] To illustrate, a resident of Missouri, who has never been subjected to a no-smoking law, might assume that smoking is allowed in a bus in California. Even a "No Smoking" sign might not adequately inform him of the California law. Nevertheless, the health hazard of smoking seems to be the type of public problem that is best controlled by the state, rather than the federal government. Although the federal government arguably has the power to enact a comprehensive non-

138. Massachusetts Representative Robert Drinan has introduced nonsmokers' rights legislation several times. BRODY, *supra* note 31, at 118. The bill he introduced in 1975 would have restricted smoking in all federal facilities and public facilities associated with common carriers engaged in interstate commerce, and would have guaranteed, as much as economically feasible, smoke-free work areas for federal employees. *Id.*

139. 32 C.F.R. § 203 (1979).

140. AMERICAN LUNG ASSOCIATION OF WESTERN MISSOURI, SMOKING AND HEALTH REPORT (Sept. 1979).

141. 49 C.F.R. § 1061 (1979).

142. 14 C.F.R. § 252 (1979). This regulation was enacted in response to complaints from nonsmokers and a government study showing that 60% of nonsmoking passengers and 38% of all passengers were bothered by smoke. SMOKING DIGEST, *supra* note 39, at 81. *See also* 38 FED. REG. 12,210 (1973).

143. 49 C.F.R. § 1124.21 (1979). In 1972, a nonsmoker was bothered by the tobacco smoke in the first-class section of an Amtrak train. When he complained to the conductor he was told that smoking was permitted in the first-class car, and if he did not like it he could move to a second-class car. He later complained to Amtrak officials and as a result of his influence, cigar and pipe smoking were banned in the first-class club car of the train. Not all nonsmokers, though, have the clout of Chief Justice Warren E. Burger. *Tobacco Pollution and the Nonsmoker's Rights*, 4 ENVT'L. L. 451 (Spring 1974).

144. BRODY, *supra* note 31, at 106.



smokers' rights statute,[145] uniformity can also be achieved by adoption of uniform legislation by the states.[146]

## V. CONSTITUTIONAL THEORIES

Commentators on the issue of nonsmokers' rights are fond of quoting the observation of George Bernard Shaw that "smokers and non-smokers cannot be equally free in the same railway carriage."[147] The pithy quote captures the essence of the dilemma: should the smoker be permitted to smoke, or should the nonsmoker's right to breathe clean air be protected? Although many jurisdictions have resolved the problem through legislation, in other jurisdictions the nonsmoker who seeks relief[148] must try alternative routes. One of these routes is constitutional law.

Three parts of the Constitution have been advocated as support for the right of the nonsmoker to breathe clean air: (1) the ninth amendment; (2) the fifth and fourteenth amendments; and (3) the first amendment. At this writing, no court has squarely accepted any of these arguments.[149]

A good argument can be made that the ninth amendment protects nonsmokers from cigarette smoke in public places. The ninth amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[150] As Justice Story wrote, the "Bill of Rights presumes the existence of a substantial body of rights not specifically enumerated but easily perceived in the broad concept of liberty and so numerous and so obvious as to preclude listing them."[151] Therefore, as Professor Lawrence Tribe explains, the ninth amendment "at least states a rule of construction pointing away from the reverse incorporation view that only the interests secured by the Bill of Rights are encompassed within the fourteenth amendment, and at most provides a positive source of law for fundamental but unmentioned

145. A Federal Clean Indoor Air Act probably could be supported by the Commerce clause. BRODY, *supra* note 31, at 119.

146. The Minnesota Clean Indoor Air Act is often used as a model by other states. SMOKING DIGEST, *supra* note 39, at 86.

147. *Antismoking Legislation*, *supra* note 14, at 167; *Non-Smoker*, *supra* note 15, at 165; 7 STUDENT LAW. 15, 16 (Mar. 1979).

148. The nonsmoker considering legal action might be able to obtain organized assistance. Action On Smoking and Health (ASH), 2000 H Street, N.W., Washington, D.C. 20006, is a national nonprofit organization dedicated to protecting the rights of nonsmokers. The American Lung Association, 1740 Broadway, New York, N.Y. 10019, might be of some help. Nonsmokers in the Midwest should contact the American Lung Association of Western Missouri, 2007 Broadway, Kansas City, Mo. 64108.

149. The dictum of Environmental Defense Fund v. Hoerner Waldorf Corp., 1 E.R. 1610, 3 E.L.R. 20,791 (D. Mont. 1978), supports a constitutional right to clean air. *See* note 160 and accompanying text *infra*.

150. U.S. CONST. amend. IX.

151. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 715-16 (1833), *quoted in* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 570 (1978).

rights."[152] Several authorities have argued persuasively that a basic unenumerated constitutional right is the right to breathe clean air.[153] One writer has said that "like food and water, the biological necessity of clean air to support life dictates that the right to a healthful environment be recognized, or all other rights are meaningless phrases."[154]

Courts that have considered the issue of a fundamental right to a clean environment under the ninth amendment have consistently refused to recognize such a right.[155] The issue was directly addressed in 1978 in *Gasper v. Louisiana Stadium & Exposition District*.[156] There, plaintiffs brought a class action under 42 U.S.C. § 1983 to enjoin officials from allowing tobacco smoking during events in the enclosed Superdome. The district court disagreed with the argument in no uncertain terms: "To hold that the First, Fifth, Ninth, or Fourteenth Amendments recognize as fundamental the right to be free from cigarette smoke would be to mock the lofty purposes of such amendments and broaden their penumbral protections to unheard-of boundaries."[157] The judge felt that the right to breathe smoke-free air was not on a constitutional par with the right to privacy in marriage, and he believed the legislative and executive branches should make the "final decisions in matters of this type."[158]

Closely related to the ninth amendment claim are the claims made under the fifth and fourteenth amendment due process clauses. Under these theories, forcing a nonsmoker to choose between staying in a smoke-filled room where he has the right to be or leaving the area deprives him

152. L. TRIBE, *supra* note 151, at 570. Some of the fundamental but unenumerated rights that have been recognized are: the right to use birth control, Griswold v. Connecticut, 381 U.S. 479 (1965); the right to travel abroad, Aptheker v. Secretary of State, 378 U.S. 500 (1964); the right to be free of certain bodily intrusions, Rochin v. California, 342 U.S. 165 (1952); the right to procreate, Skinner v. Oklahoma, 316 U.S. 535 (1942); the right to send one's child to a private school, Pierce v. Society of Sisters, 268 U.S. 510 (1925); and the right to teach one's child a foreign language, Meyer v. Nebraska, 262 U.S. 390 (1923).

153. Environmental Defense Fund v. Hoerner Waldorf Corp., 1 E.R. 1640, 3 E.L.R. 20,794 (D. Mont. 1970); BRODY, *supra* note 31, at 87-88; *Ire*, *supra* note 44, at 72; *Non-Smoker*, *supra* note 15, at 143, 165; Comment, *Toward Recognition of Nonsmokers' Rights in Illinois*, 5 LOY. CHI. L.J. 610, 614 (1974).

154. *Non-Smoker*, *supra* note 15, at 143.

155. Ely v. Velde, 451 F.2d 1130 (4th Cir. 1971); Gasper v. Louisiana Stadium & Exposition Dist., 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979); Federal Employees for Non-smokers' Rights v. United States, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 100 S. Ct. 265 (1979); *In re* "Agent Orange" Prod. Liab. Litigation, 475 F. Supp. 928 (E.D.N.Y. 1979); Pinkney v. Ohio Environmental Protection Agency, 375 F. Supp. 305 (N.D. Ohio 1974); Tanner v. Armco Steel Corp., 340 F. Supp. 532 (S.D. Tex. 1972); Environmental Defense Fund v. Corps of Eng'rs, 325 F. Supp. 728 (E.D. Ark. 1971); GASP v. Mecklenburg County, 12 N.C. App. 228, 256 S.E.2d 477 (1979). *But see* the dictum in Environmental Defense Fund v. Hoerner Waldorf Corp., 1 E.R. 1640, 1641, 3 E.L.R. 20,791, 20,799 (D. Mont. 1970).

156. 577 F.2d 897 (1978), *aff'g* 418 F. Supp. 716 (1976), *cert. denied*, 439 U.S. 1073 (1979).

157. 418 F. Supp. at 721.

158. *Id.* at 722.



of life and liberty under the due process clause.[159] Advocates of this argument believe the right to life involves a right to health. The dictum in one environment case declared, "[T]he right to life and liberty and property are constitutionally protected. Indeed the Fifth and Fourteenth Amendments provide that these rights may not be denied without due process of law, and surely a person's health is what, in a most significant degree, sustains life."[160] Since the due process clause has been read with the ninth amendment to protect many unenumerated rights,[161] including the right to have an abortion,[162] it seems reasonable that the right to clean air be considered a fundamental right worthy of due process protection.

The *Louisiana Stadium* court rejected the due process claims, distinguishing the situation in the Superdome from that in *Pollak v. Public Utilities Commission*,[163] cited by the plaintiff. In *Pollak*, a bus company enjoyed a virtual monopoly of the mass transit in the District of Columbia, as a result of congressional authorization. The company contracted with a radio station to install speakers in the buses and to play only that station's programming. Plaintiffs were passengers who were forced to ride the bus by the lack of alternative transportation. They claimed the forced listening deprived them of liberty without due process of law. The District of Columbia Circuit Court of Appeals found that the arrangement violated the fifth amendment.[164] The primary distinction between *Pollak* and *Louisiana Stadium* is that the Superdome plaintiffs were not compelled to use the facility, as were the plaintiffs in *Pollak*, who had no alternative transportation.[165] This argument has been criticized, though, on the ground that to live a "full, normal, and healthy" life, one will inevitably find it necessary to be in public places.[166]

Another recent case, *Federal Employees for Non-Smokers' Rights v. United States*,[167] followed *Louisiana Stadium* and denied nonsmokers a cause of action under the due process clause. In *Federal Employees*, plaintiffs were nonsmokers employed by the federal government, who sought an injunction restricting smoking to designated areas of federal buildings. The

159. Gasper v. Louisiana Stadium & Exposition Dist., 577 F.2d 897 (5th Cir. 1978), *aff'g* 418 F. Supp. 716 (1976), *cert. denied*, 439 U.S. 1073 (1979); Federal Employees for Non-Smokers' Rights v. United States, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 100 S. Ct. 265 (1979); BRODY, *supra* note 31, at 88-90; *Non-Smoker*, *supra* note 15, at 143, 165-70.

160. Environmental Defense Fund v. Hoerner Waldorf Corp., 1 E.R. 1640, 1641, 3 E.L.R. 20,794, 20,794 (D. Mont. 1970).

161. *See* note 152 and accompanying text *supra*.

162. Roe v. Wade, 410 U.S. 113 (1973).

163. 191 F.2d 450 (D.C. Cir. 1951), *rev'd*, 343 U.S. 451 (1952).

164. The Supreme Court held that there had not been a violation of due process, and reversed the court of appeals. 343 U.S. 451, 465 (1952). The plaintiff in *Louisiana Stadium*, however, argued that the *Pollak* Court had reversed on grounds other than the due process issue. 418 F. Supp. 716, 719 (1976).

165. 418 F. Supp. at 720; BRODY, *supra* note 31, at 87.

166. *Ire*, *supra* note 44, at 80.

167. 598 F.2d 310 (D.C. Cir.), *cert. denied*, 100 S. Ct. 265 (1979).

court denied the plaintiffs' causes of action under the Constitution and the Occupational Safety and Health Act of 1970, 29 U.S.C. § 668(a), but refused to dismiss the count brought under the common law duty of the employer to make the workplace safe.[168]

The first amendment argument was made in both *Federal Employees* and *Louisiana Stadium*. The first amendment has been interpreted to protect the right to receive information and ideas freely.[169] The ability of the nonsmoker to receive information is arguably impaired when smoking is allowed in government buildings where ideas and information are transmitted (*e.g.*, schools, auditoriums, museums, libraries).[170] The *Louisiana Stadium* plaintiffs complained that their right to exposure to events at the Superdome fit under this analysis.[171] The *Federal Employees* plaintiffs were an even better example since their right to exposure involved the workplace situation, rather than a place of entertainment.[172] In both cases the Court rejected the first amendment argument.

One commentator has suggested that nonsmokers might have a constitutional claim under the equal protection clause of the fourteenth amendment. He argues that when the state promotes legislation allowing smoking in public buildings, people sensitive to tobacco smoke are denied the equal protection of the law. In sanctioning smoking in public buildings, he contends, the state is denying to the sensitive person what it warrants to all other persons—the right of occupancy without harm to one's well-being.[173] This argument is unlikely to survive the traditional equal protection analysis. In equal protection, the rational basis test is usually used to determine the legitimacy of government actions. Only if a fundamental right or a suspect class is involved will the strict scrutiny/compelling state interest test be used.[174] Nonsmokers could hardly be called a suspect class,[175] and most courts have not considered the right to clean air as fundamental.[176] Thus, the rational basis test would be applied and the government action would probably be upheld. The equal protection clause does not seem a likely source of relief for nonsmokers.

A threshold problem with the equal protection argument is common to all of the constitutional claims by nonsmokers—the necessary element of state action. In the vast majority of cases, the problem is state *inaction*, rather than action. Only two states, Arkansas and Pennsylvania, have

168. 446 F. Supp. 181, 182, *aff'd*, 598 F.2d 310 (D.C. Cir.), *cert. denied*, 100 S. Ct. 265 (1979).
169. Stanley v. Georgia, 394 U.S. 557, 564 (1969); Lamont v. Postmaster Gen., 381 U.S. 301, 307-08 (1965); Brody, *supra* note 31, at 86-87.
170. Brody, *supra* note 31, at 86-87.
171. 418 F. Supp. at 717-18.
172. 446 F. Supp. at 183-85.
173. *Non-Smoker*, *supra* note 15, at 166.
174. *See generally* J. Nowak, R. Rotunda & J. Young, Handbook on Constitutional Law 524 (1978).
175. *Id.* at 525.
176. *See* note 155 and accompanying text *supra*.



statutes specifically *allowing* smoking in public places.[177] In fact, the Pennsylvania statute goes so far as to prohibit city councils from passing ordinances that would "prohibit smoking in any restaurant room, rest room, beauty parlor, executive office or any room designated for smoking in such store."[178] In states other than Pennsylvania and Arkansas, however, the state has taken no action allowing smoking. Under present state action theory, it appears unlikely that state inaction would satisfy the state action requirement.[179] Since most states have enacted some type of non-smoking statute, however, state action might be found in passage of an inadequate statute.[180] This argument also seems weak.

Realistically, the chances of succeeding under a constitutional theory seem small for the nonsmoker at this stage of the legal conflict. The United States Supreme Court denied certiorari for the *Louisiana Stadium* case in January 1979,[181] and for the *Federal Employees* case in October 1979.[182] In light of the present Court's narrow interpretation of the concept of "Constitutional Rights" in other cases,[183] it seems unlikely this Court would resolve these constitutional theories in favor of the nonsmoker.

## VI. Tort Theories

### A. *Common Law Torts*

When legislation has not provided nonsmokers an adequate remedy at law, the common law has been found to provide protection. In what is probably the single most significant legal stride in the nonsmokers' rights movement, a New Jersey court ruled in *Shimp v. New Jersey Bell Telephone Co.*[184] that the common law duty of the employer to provide a safe workplace for employees mandates that the employer protect nonsmoking employees from the hazard of second-hand cigarette smoke.

In *Shimp*, a case of first impression, plaintiff had been employed in the offices of New Jersey Bell Telephone Company for several years. In the early seventies she began suffering a variety of severe symptoms as a result of an allergy to cigarette smoke.[185] Her allergic reaction could be

177. Ark. Stat. Ann. § 82-3702 (Cum. Supp. 1979); Pa. Stat. Ann. tit. 35, §3702 (Purdon 1972).
178. Pa. Stat. Ann. tit. 35, § 3702 (Purdon 1972).
179. *See Ire*, *supra* note 44, at 75.
180. *Id.*
181. 439 U.S. 1075 (1979).
182. 100 S. Ct. 265 (1979).
183. *E.g.*, Paul v. Davis, 424 U.S. 693 (1976).
184. 145 N.J. Super. 516, 368 A.2d 408 (App. Div. 1976), *noted in* Note, *Torts—Nonsmokers' Rights—Duty of Employer to Furnish Safe Working Environment Will Support Injunction Against Smoking in the Work Area*, 9 Tex. Tech. L. Rev. 853 (1977); Note, *Torts—Occupational Safety and Health—Employee's Common Law Right to a Safe Workplace Compels Employer to Eliminate Unsafe Conditions*, 30 Vand. L. Rev. 1071 (1977).
185. Her symptoms included skin eruptions, Shimp Book, *supra* note 46, at 60, as well as severe throat irritation, nasal irritation sometimes taking the form of nosebleeds, irritation to the eyes resulting in corneal abrasion and corneal erosion, headaches, nausea, and vomiting, 145 N.J. Super. at 521, 368 A.2d at 410.

triggered by the presence of as little as one nearby smoker.[186] In the office to which she was transferred in 1975, seven of thirteen employees smoked heavily.[187] Shimp's utilization of company grievance mechanisms resulted only in the installation of an ineffective exhaust fan.[188] Shimp was offered the opportunity to move to a different location, but the move would have entailed a demotion and a decrease in pay.[189] After seeking relief through several governmental agencies, she brought suit in equity for injunctive relief.

In a landmark opinion, Superior Court Judge Phillip A. Gruccio carefully analyzed the relationship of the common law to the nonsmoker in the workplace. He stated that an employee has a right to work in a safe environment and an employer has a concomitant, affirmative duty to provide a safe work area.[190] These are widely recognized common law concepts.[191] The court noted that the Occupational Safety and Health Act did not preempt the field of occupational safety since it specifically recognized the concurrent power of a state to affect the employee-employer relationship through common law judicial and legislative action.[192] The judge recognized that cigarette smoke was toxic and dangerous to the health of this plaintiff and that of smokers and nonsmokers generally.[193] Judge Gruccio ruled that the plaintiff had not assumed the risk of harm since cigarette smoke is not a natural by-product that is a *necessary result* of the operation of the telephone business.[194] The judge noted that New Jersey Workmen's Compensation law might be a bar to monetary damages, but did not prohibit a suit for injunctive relief.[195] After considering the issues and the evidence, the court granted the injunction, and ordered New Jersey Bell to provide Shimp with safe working conditions "by restricting the smoking of employees to the nonwork area presently used as a lunch room" and prohibiting smoking "in the offices or adjacent customer service area."[196]

Although *Shimp* is a New Jersey case, it offers strong precedent for nonsmoking workers in other jurisdictions. This would be especially true in Missouri since a Missouri judge will probably find no local case directly on point. Of particular precedential value in *Shimp* are the strong statements of legal recognition of the dangers of cigarette smoke.[197] Although a

186. 145 N.J. Super. at 521, 368 A.2d at 410.
187. SHIMP BOOK, *supra* note 46, at 61.
188. 145 N.J. Super. at 521, 368 A.2d at 410.
189. SHIMP BOOK, *supra* note 46, at 61-62.
190. 145 N.J. Super. at 521, 368 A.2d at 410.
191. W. PROSSER, THE LAW OF TORTS 526 (4th ed. 1971).
192. 145 N.J. Super. at 522, 368 A.2d at 410-11.
193. *Id.* at 526, 368 A.2d at 413.
194. *Id.* at 523, 368 A.2d at 411.
195. *Id.* at 524, 368 A.2d at 412.
196. *Id.* at 531, 368 A.2d at 416.
197. *Id.* at 526-31, 368 A.2d at 413-14. Legislative declarations in state statutes and federal regulations are also valuable. *See* notes 66-71 and accompanying text *supra*.



given jurisdiction might never have recognized tobacco smoke in the air as an unsafe work environment in the past, the strong language of *Shimp* and the ever-increasing medical evidence of the danger of involuntary smoking may be enough to persuade a court of the real danger involved. Although it might be argued that *Shimp* only supports plaintiffs with allergic reactions to tobacco smoke, the New Jersey court recognized the danger of tobacco smoke to nonsmokers in general,[198] as well as to those with allergies. The only real problem for the plaintiff bringing a suit like *Shimp* is that the subject is still new and controversial; a judge hesitant to apply old law to a new fact situation, even when warranted by the evidence, might be reluctant to follow *Shimp*.[199]

*Shimp* involved only the employer's common law duty of providing a safe workplace, but different theories of common law duty might be found to protect nonsmokers from cigarette smoke in other places. In states where the legislature has not already dealt with the matter, the common law might protect people from cigarette smoke in common carriers, theaters, lobbies, bowling alleys, and other public and semi-public places where the person in charge of the premises has been deemed to have a general duty to protect people on the premises from harm.[200]

### B. *Nuisance*

Several authorities have suggested nuisance theories as a possible remedy for the nonsmoker.[201] The private nuisance tort is probably of little use in this context[202] because of its definition as "a nontrespassory invasion of another's interest *in the private use and enjoyment of land*."[203] In the normal situation where the nonsmoker is seeking relief from tobacco smoke in public places, the use and enjoyment of his land will not be involved.[204] One commentator has suggested, without citing authority, that an interest in a seat at a sports event or theatrical performance might be considered a limited property interest worthy of protection by private

198. 145 N.J. Super. at 526, 368 A.2d at 413.
199. Donna Shimp's lawyer emphasizes the importance of choosing a judge who is "innovative and fearless and not hesitant to make new law if the evidence warrants it." SHIMP BOOK, *supra* note 46, at 45. He also feels it is important to make a low-key presentation, showing that the case is simply one involving a worker's right to a healthy environment based on the medical evidence presented. *Id.*
200. BANOV, *supra* note 51, at 82.
201. *Id.* at 85-86; *Ire*, *supra* note 44, at 81-86; *Non-Smoker*, *supra* note 15, at 155-57; Comment, *Toward Recognition of Nonsmokers' Rights in Illinois*, 5 LOY. CHI. L.J. 610, 618-22 (1974).
202. *See Ire*, *supra* note 44, at 82.
203. RESTATEMENT (SECOND) OF TORTS § 821D (1979) (emphasis added).
204. In a few unusual situations, the use or enjoyment of land would be impaired by cigarette smoke. For instance, a nonsmoker might suffer a health impairment when his neighbors in an apartment building smoke heavily. *See Ire*, *supra* note 44, at 82 n.97. The plaintiff would have to show, however, that the quantity and probability of harm outweighs the utility of the conduct. RESTATEMENT (SECOND) OF TORTS §§ 822, 829 (1979).

nuisance law.[205] A nonsmoker in Missouri may have a better chance of success than those in most states because Missouri has a special line of cases that do not require the *use of land* as an element of private nuisance.[206] A private nuisance action by a nonsmoker against a smoker would nonetheless be a case of first impression and the outcome is highly uncertain.

The nonsmoking plaintiff seems to have a better chance of recovery under the public nuisance theory.[207] Several states specifically designate smoking in public as a public nuisance.[208] Other statutes describe smoking as a health hazard.[209] In these states, a cause of action for public nuisance can surely be brought; the question would be *who* could bring the suit. Most states have a broad statute defining a public nuisance as "any activity which interferes with the health and comfort of the public."[210] Under these statutes, the plaintiff will have to show tobacco smoke is a health hazard sufficiently substantial and unreasonable to constitute a public nuisance.[211] If the smoking was done in a place prohibited by statute, however, the statute would be persuasive evidence of the unreasonableness of the act.[212] Because forty-seven states list at least one place where smoking is prohibited,[213] the public nuisance theory would seem to be available in most states.

The principal problem with using the public nuisance theory is the widely accepted limitation that a public nuisance claim may only be brought by a public official acting on behalf of the public and not by a private individual.[214] Thus, the nonsmoker should first contact a local prosecutor, the attorney general or designated health officials and try to persuade one of them to bring the suit. Failing that, the individual himself might be able to bring the public nuisance action. A private individual is allowed to bring a public nuisance action if he can show he suffered damage peculiar to himself and not shared in common by the rest of the public.[215] Thus, the typical nonsmoker whose only injury is eye and nasal irritation might not be able to bring a public nuisance claim because his injury is arguably not different in kind from that of others.[216] According

205. BRODY, *supra* note 31, at 85.
206. *See* cases cited in Comment, *The Law of Private Nuisance in Missouri*, 44 MO. L. REV. 20, 23 n.12 (1979) (criticizing these cases as inappropriate applications of nuisance law).
207. *See generally Ire*, *supra* note 44, at 82; *Non-Smoker*, *supra* note 15, at 156.
208. *See* note 67 *supra*.
209. *See* note 66 *supra*.
210. *Ire*, *supra* note 44, at 82, *citing* Arizona, California, Oklahoma, and South Dakota statutes.
211. *Id.* at 81-82.
212. *Id.* at 83, *citing* 58 AM. JUR. 2d *Nuisances* § 50 (1971).
213. *See* notes 57-63 and accompanying text *supra*.
214. W. PROSSER, *supra* note 191, at 586-87. One commentator speculates that special injury may no longer be required. Comment, *Toward Recognition of Nonsmokers' Rights in Illinois*, 5 LOY. CHI. L.J. 610, 621 (1974).
215. W. PROSSER, *supra* note 191, at 586; Comment, *The Law of Private Nuisance in Missouri*, 44 MO. L. REV. 20, 31 (1979).
216. *Ire*, *supra* note 44, at 85.



to the *Restatement of Torts*, however, "when the public nuisance causes personal injury to the plaintiff, the harm is normally considered different in kind from that suffered by other members of the public and the tort action may be maintained."[217] Moreover, even if the minor eye and nasal irritation is not considered different in kind, individuals who suffer heart, lung, or allergic conditions undoubtedly suffer an injury different in kind from the general members of the public.[218]

The remedies available under nuisance theories include damages and injunctive relief.[219] The plaintiff may recover damages for the injury to his health, plus the value of any personal discomfort or inconvenience that he has suffered.[220] As a practical matter, however, these damages might only be nominal.[221] The availability of an injunction is probably more valuable to the nonsmoker.[222] Although enjoining an individual who smoked in a public place from doing so again might be an inefficient method for dealing with smoking in public under many circumstances,[223] an injunction might be the perfect remedy in cases involving the workplace or elevators, where the same smoker constantly comes into contact with the plaintiff.[224] The *Restatement of Torts* provides that the public official is not the only party who can bring a suit for injunctive relief: a person who has suffered damages different from those suffered by other people may also seek an injunction.[225]

At least one suit has been brought in which the nonsmoking plaintiff claimed public smoking was a public nuisance. In *Stockler v. City of Pontiac*,[226] the plaintiff, a pipe smoker and season ticket holder for Detroit Lions games, brought a public nuisance suit in his own name and in the name of the state of Michigan.[227] He claimed that smoking during events in the 80,000-seat Pontiac Silverdome Stadium violated a local fire ordinance and constituted a public nuisance. The court heard medical testimony and other evidence and found that smoking in the stadium constituted a public nuisance. The court issued a writ of mandamus ordering the city to abate the nuisance by prohibiting smoking and the sale of cigarettes within the facility. The city obtained a stay of the writ and the suit was ultimately settled. The out-of-court settlement agreement

217. RESTATEMENT (SECOND) OF TORTS § 821C, Comment d (1979). *See also id.*, Comment d, Illustration 2.
218. *Ire*, *supra* note 44, at 85.
219. W. PROSSER, *supra* note 191, at 602.
220. *Id.* at 605.
221. *Ire*, *supra* note 44, at 85.
222. *Id.*
223. BRODY, *supra* note 31, at 85; Comment, *Toward Recognition of Nonsmokers' Rights in Illinois*, 5 LOY. CHI. L.J. 610, 621 (1974).
224. *Ire*, *supra* note 44, at 86.
225. RESTATEMENT (SECOND) OF TORTS § 821C, Comment j (1979).
226. No. 75-151479 (Cir. Ct. Oakland County, Mich., Dec. 17, 1975).
227. *See* SMOKING DIGEST, *supra* note 59, at 88; *Ire*, *supra* note 44, at 86 n.111.

bans smoking in the stands, but permits it in concourse areas, restrooms, and private boxes.[228]

### C. *Battery*

A cause of action for battery is another possibility for the nonsmoker in his legal conflict with the smoker. The results of a battery suit will largely depend on the facts of each case. In the blatant example where the smoker blows smoke directly into the face of the nonsmoker and says, "I can afford to pay the fine!," a battery action will lie.[229] In other cases where the smoker is quietly smoking and the nonsmoker across the aisle becomes ill, the result is more questionable.[230]

The *Restatement of Torts* states the elements of battery as: (1) intent to cause a harmful or offensive contact, plus resulting (2) harmful or offensive (3) contact.[231] In order to succeed in a claim for battery, the nonsmoker must establish three propositions: (1) breathing tobacco smoke is a contact; (2) such contact was harmful or offensive; and (3) the smoker intended the consequences of his act.

Exposure to cigarette smoke probably meets the requirement of a "contact." There is no question that the particles of smoke do in fact come into contact with the person of the nonsmoker.[232] In fact, studies show that because of the comparative chemistries of the human body and cigarette smoke, the smoke is actually attracted to human bodies like metal shavings to a magnet.[233] Battery does not require direct application of force by one person to another.[234] It is enough that the defendant has set into motion a force that ultimately produces the result.[235]

Exposure to cigarette smoke probably meets the requirement of a harmful or offensive contact. At least one case,[236] several legislative bodies,[237] and extensive medical evidence[238] have recognized involuntary exposure to cigarette smoke as dangerous to the nonsmoker. Even if it were not dangerous, the contact would likely be offensive, particularly since 75% of nonsmokers find it annoying to be around a smoker.[239] Ordinary contacts that are "customary and reasonably necessary to the common intercourse of life, such as a tap on the shoulder to attract attention, a friendly grasp of the arm, or a casual jostling to make a passage,"[240] on the other hand, have been held not to be offensive touchings. Smoking, though, is certainly not reasonably *necessary* to the common intercourse of life,[241] and the effects of smoking appear to be more serious than the slight jostlings mentioned by Dean Prosser. Nonetheless, a jury might find the particular plaintiff involved did not suffer an offensive contact. A stronger showing on this issue could, of course, be made by a plaintiff who is one of the 34 million Americans allergic to tobacco smoke.[242]

The most difficult element to prove in the battery case would be the smoker's intent to commit the battery. All consequences that the actor *desires* to bring about are intended.[243] Thus, the smoker who blows smoke in the face of the nonsmoker is guilty of battery and is liable for any actual damages, even those that are unforeseeable,[244] and may be liable for punitive damages as well.[245] Intent is not limited to consequences that are desired, however. "If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result."[246] Thus, a smoker who knew involuntary smoking was harmful or offensive to nonsmokers would be liable for smoking around them. A smoker who honestly did not know of the danger would probably not be liable. If the nonsmoker notifies the smoker that breathing second-hand smoke makes him ill, it would seem the smoker should no longer be able to plead ignorance.[247]

Battery has been involved in a few colorful nonsmokers' rights cases. In Sidney, Australia, a smoker who intentionally blew smoke into the face of a nonsmoker was found guilty of assault and fined $298.[248] In North Carolina, a postman made numerous complaints to his superior about the

228. SMOKING DIGEST, *supra* note 39, at 88.
229. This was the fact situation of the Sabina Shalom incident, in which the smoker was prosecuted under a state law, rather than being sued for battery. *See* notes 125 & 126 and accompanying text *supra*.
230. *Ire*, *supra* note 44, at 88.
231. RESTATEMENT (SECOND) OF TORTS § 13 (1965).
232. *See Ire*, *supra* note 44, at 87.
233. BRODY, *supra* note 51, at 52.
234. W. PROSSER, *supra* note 191, at 34.
235. *Id.* at 35.
236. *See* notes 181-200 and accompanying text *supra*.
237. *See* notes 66-71 and accompanying text *supra*.
238. *See* notes 37-49 and accompanying text *supra*.
239. *See* note 52 and accompanying text *supra*.
240. W. PROSSER, *supra* note 191, at 37.
241. The *Shimp* court said: "There is no necessity to fill the air with tobacco smoke in order to carry on defendant's business, so it cannot be regarded as an occupational hazard which plaintiff has voluntarily assumed in pursuing a career as a secretary." 145 N.J. Super. at 525, 368 A.2d at 411.
242. *See* text accompanying note 44 *supra*. *But see* McCracken v. Sloan, 40 N.C. App. 214, 252 S.E.2d 250 (1979). *See* notes 249-56 and accompanying text *infra*.
243. RESTATEMENT (SECOND) OF TORTS § 8A, Comment b (1965).
244. W. PROSSER, *supra* note 191, at 35. As a practical matter, the damages will often be too small to pay the cost of the suit. BRODY, *supra* note 51, at 78.
245. W. PROSSER, *supra* note 191, at 35.
246. RESTATEMENT (SECOND) OF TORTS § 8A, Comment b (1965).
247. Brody & Brody would go a step further: "In fairness, a nonsmoker should not be required to object to a smoker in order to establish a battery." BRODY, *supra* note 51, at 77. The *McCracken* court, however, took the opposite view: "In examining the plaintiff's claim, we observe that it has been said 'it may be questioned whether any individual can be permitted, by his own fiat, to erect a glass cage around himself, and to announce that all physical contact with his person is at the expense of liability.'" 40 N.C. App. at 217, 252 S.E.2d at 252 (citing W. PROSSER, *supra* note 191, at 37).
248. AMERICAN LUNG ASSOCIATION OF WESTERN MISSOURI, SMOKING AND HEALTH REPORT (Oct. 1978).

adverse health effects he had suffered at work from tobacco smoke in the work environment. He finally asked for a sick leave because of his allergy to the smoke.[249] The supervisor denied the request and summoned the postman to a meeting to discuss the problem. The supervisor smoked a cigar at the meeting, and the postman became ill and had to miss work and seek medical care. The postman filed suit seeking actual damages of $5,000 and punitive damages of $10,000.[250] Although a doctor had testified that the plaintiff had "severe respiratory problems when around cigarette smoke," the court held in *McCracken v. Sloan*[251] that there had been no competent evidence presented that the plaintiff suffered a physical illness from exposure to cigar smoke. The court stated:

> We express no opinion as to what the result would be if there were evidence of some physical injury, but on the facts of this case we cannot hold it is an assault or battery for a person to be subjected either to the apprehension of smelling cigar smoke or the actual inhaling of the smoke. This is an apprehension of a touching and a touching which must be endured in a crowded world.[252]

The *McCracken* court arguably made two mistakes. First, the court seemed to consider aggravation of an allergy to be a totally insignificant harm. Actually, allergies to cigarette smoke can involve serious symptoms,[253] and the record before the court included expert testimony that the plaintiff suffered *"severe respiratory problems* when around cigarette smoke."[254] Even if causing severe respiratory problems is not physical harm, it certainly could be considered an offensive touching. The court's second mistake, therefore, was requiring plaintiff to show a physical illness in order to prove battery. Tort law in most jurisdictions,[255] including North Carolina,[256] recognizes an offensive touching as sufficient.

### D. *Intentional Infliction of Mental Distress*

The intentional infliction of mental distress tort has been mentioned as a possible remedy available to the nonsmoker.[257] Although at first glance the tort does not seem to apply to smoking conflicts, closer examination reveals certain circumstances in which a plaintiff should be allowed this cause of action.

To recover under a theory of intentional infliction of mental distress, a plaintiff must show that the extreme and outrageous conduct of the defendant has caused him to suffer emotional distress.[258] Bodily harm is not required. The emotional distress might include "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea."[259]

In the majority of nonsmokers' rights cases, the requirement of "extreme and outrageous conduct" would probably not be met. The *Restatement of Torts* states it is not enough that an act be inconsiderate and unkind. Rather, the *Restatement* would impose liability only where the conduct of the defendant has been so atrocious and utterly intolerable that the average member of the community would view the conduct and exclaim, "Outrageous!"[260] The cases where cigarette smoking in public can truly be considered "outrageous" are few.

Comment f to section 46 of the *Restatement* explains that the extreme and outrageous character of the conduct may arise from the defendant's knowledge that the plaintiff is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity. "The conduct may be heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge, where it would not be so if he did not know."[261] For example, suppose the plaintiff were a nonsmoker who was often bothered by smoking at his workplace. He had complained to his supervisor about the problem, and his supervisor was well aware of plaintiff's aversion to cigarette smoke. Plaintiff was made sick at work by the smoke and he went to the hospital. The supervisor visited the plaintiff in the hospital room and blew smoke in his face. In these or similar circumstances, the average member of the community might well exclaim, "Outrageous!," and a cause of action for intentional infliction of mental distress would lie.[262]

### E. *Strict Liability*

It has been suggested that the smoker should be held strictly liable for the injury he inflicts on the nonsmoker under the "abnormally dangerous activity" doctrine.[263] Under this theory, a person who carries on an abnormally dangerous activity is subject to liability for resulting harm to the plaintiff, if the harm is the kind of harm that made the activity dangerous in the first place.[264] The paramount question in nonsmokers' rights cases brought under this theory would be whether tobacco smoking should be considered an abnormally dangerous activity.

249. McCracken v. Sloan, 40 N.C. App. 214, 252 S.E.2d 250 (1979).
250. *Ire, supra* note 44, at 89 n.129.
251. 40 N.C. App. at 215, 252 S.E.2d at 251.
252. *Id.* at 217, 252 S.E.2d at 252.
253. *See* notes 43-45 and accompanying text *supra*.
254. 40 N.C. App. at 215, 252 S.E.2d at 251 (emphasis added).
255. *E.g.*, Stowers v. Ardmore Acres Hosp., 19 Mich. App. 115, 126, 172 N.W.2d 497, 502-03 (1969); 6A C.J.S. *Assault & Battery* § 8 (1975).
256. Ormond v. Crampton, 16 N.C. App. 88, 191 S.E.2d 105, *cert. denied*, 282 N.C. 301, 192 S.E.2d 191 (1972).
257. *Ire, supra* note 44, at 89.
258. RESTATEMENT (SECOND) OF TORTS §§ 46-47 (1965).
259. *Id.*
260. *Id.*
261. *Id.*
262. *See* RESTATEMENT (SECOND) OF TORTS § 46, Comment f, Illustration 12 (1965); *Cf.* notes 249-56 and accompanying text *supra* (the *McCracken* fact situation, *see* text accompanying notes 249 & 250 *supra*, arguably presents an intentional infliction of mental distress).
263. BRODY, *supra* note 31, at 93-95.
264. RESTATEMENT (SECOND) OF TORTS § 519 (1977).

The *Restatement of Torts* lists several factors to consider when determining whether an activity is abnormally dangerous, including: (1) the existence of a high degree of risk of a great harm to others; (2) the inability to eliminate the risk even by the use of reasonable care; (3) whether the activity is a matter of common usage; (4) whether the activity is appropriate to the place it is done; and (5) the extent to which its value to the community is outweighed by its dangerous attributes.[265] All six factors do not have to be present in order for liability to be found, but all are of importance.[266]

In applying these factors to the nonsmokers' rights setting, the prospects for successful use of this theory seem remote. One factor that would be insurmountable in most cases would be the requirement of "great harm." Although the *Restatement* mentions nuclear explosions[267] and the like, persons suffering heart or lung disease might meet the requirement, as might children.[268] In the nonsmokers' favor are the facts that there would be a high risk of harm to nonsmokers, the smoker cannot make the smoke less dangerous by the use of reasonable care, smoking is inappropriate in many enclosed indoor places, and smoking has little value to the community as compared to its danger to involuntary smokers. When all of the factors are considered, even though each does not have to be met, it would seem the nonsmoker would rarely have a good cause of action under this theory. As Professor Brody suggests, however, "Smoking in the intensive care unit of a hospital may well be 'abnormally dangerous.' "[269]

### F. *Product Liability*

An analysis of the product liability suits against tobacco companies is somewhat beyond the scope of this Comment. It might be important for the nonsmoker to keep in mind, though, that at one time during the late fifties and early sixties, when the link between cigarette smoking and cancer was suspected but not proven, several cancer victims brought product liability actions against cigarette companies.[270] Without exception, these suits failed. In the mid-sixties, legal commentators felt suits against tobacco companies would never overcome the assumption of the risk doctrine, since the smoker knew just as much about the alleged danger of smoking as did the tobacco companies.[271]

Product liability suits might well enjoy a revival, however, as a result of the mounting evidence that involuntary smoking is harmful to innocent

265. *Id.* § 520.
266. *Id.*, Comment f.
267. *Id.*, Comment g.
268. Brody, *supra* note 31, at 91; *see* notes 39-42 and accompanying text *supra*.
269. Brody, *supra* note 31, at 91.
270. For a collection of cases and articles dealing with the product liability suits against tobacco companies, see W. Prosser, *supra* note 191, at 660 nn. 82 & 83.
271. *See* Wegman, *Cigarettes and Health: A Legal Analysis*, 51 Cornell L.Q. 678, 719-21 (1966); Comment, *Can Cigarettes Be Merchantable, Though They Cause Cancer?*, 6 Ariz. L. Rev. 82, 91 (1964).



bystanders near a smoker.[272] Innocent bystanders, unlike smokers, do not assume the risk. Modern tort cases have allowed bystanders to recover in product liability cases.[273] Nevertheless, many difficulties would be encountered in such a suit: the plaintiff must convince the court to follow the cases allowing a bystander to recover; the plaintiff must establish that tobacco products are legally defective; the plaintiff must establish that the tobacco product was a substantial factor in the cause of his injury; and the plaintiff must convince the court that his claim is not frivolous.[274]

## VII. Conclusion

Less than a decade has passed since the 1972 Surgeon General's report warned that cigarette smoke could be dangerous to nonsmokers who breathe it involuntarily. As recognition of the danger to nonsmokers has increased, the movement to solidify the rights of nonsmokers to be free from the danger has also increased. State legislatures and courts should be given credit for reacting fairly quickly to this significant health hazard. At the present time, only fourteen states have not yet enacted a regulation or statute giving some protection to nonsmokers. Although constitutional arguments have failed so far, nonsmokers have had some success with tort claims, particularly in the workplace situation. During the last decade, nonsmokers have tested the water in a new area of law, with the clear result that legal remedies now exist for the nonsmoker who cares enough about his rights to seek legal help.

Morley Swingle

272. One lawyer who evidently feels such a revival is possible is Melvin Belli, who is reportedly eager to find the right case. Reader's Digest, Feb. 1980, at 105.
273. *See, e.g.*, Elmore v. American Motors Co., 70 Cal. 2d 578, 451 P.2d 84, 75 Cal. Rptr. 652 (1969).
274. These issues are examined in Brody, *supra* note 31, at 90-95.

II

# AMERICAN LUNG ASSOCIATION OF MONTANA

Christmas Seal Bldg. — 825 Helena Ave.
Helena, MT 59601 — Ph. 442-6556

EARL W. THOMAS
EXECUTIVE DIRECTOR

STATEMENT OF STEPHEN BALAZS, PROGRAM CONSULTANT FOR THE AMERICAN LUNG ASSOCIATION OF MONTANA, BEFORE THE HOUSE PUBLIC HEALTH COMMITTEE, FEBRUARY 20, 1981, ON HB 794

Enforcement is the necessary component that makes legislation work. Without adequate enforcement, or procedures for upholding them, laws are nothing but eloquent writing on pieces of paper.

Because of its lack of enforcement and provisions for penalties, Montana's present Clean Indoor Air Act of 1979 is an anemic enigma, laughable with non-compliance. It has become a toy teapot in a tempest some say is overburdened with regulations.

But laws which empower the state or individual communities to protect the health, safety, or morals of its people are neither unconstitutional, without precedent, or an abuse of civil authority when such laws "are not arbitrary or discriminatory, and if the requirements of due process are satisfied. [1]"

The American Lung Association of Montana, therefore, supports HB 794, which upholds the right of Montanans to breathe air unpolluted by tobacco smoke in certain areas of public facilities or where the public gathers, and protects their health through the strength of reasonable enforcement.

Any nonsmoking (or smoking) legislation should provide a solution that is both appropriate and reasonable. Such regulations, as are contained in HB 794, are not directed against smokers (nor do they protect them from the ill effects of their own smoke), but rather, they act in favor of the health of the innocent nonsmoker and the right to breathe air unpolluted by tobacco smoke.

The U.S. Supreme Court has required that two provisions of the U.S. Constitution, the Fourteenth Amendment due process and equal protection clauses, be considered when determining the validity of statutes such as HB 794.

The enforcement and penalty provisions in HB 794, to uphold the rights of all Montanans, smokers and nonsmokers alike, in the public facilities defined in 50-40-103 (2), are neither arbitrary, discriminatory, or invalid if due process and equal protection has been considered.

As to equal protection, the Court has said:

> "The equal protection clause will be violated where the legislature makes impermissably discriminatory or arbitrary classifications under a police power statute. It seems unlikely that a valid substantive argument can be made that restrictions on smoking in public places deny to the smoker the equal protection of the laws, or that singling out smokers for regulation to minimize the health hazard of tobacco smoke is an invalid legislative classification. [2]"

Aside from the philosophic and legalistic arguments that might be welghed into HB 794, are the increasing medical and scientific data documenting the serious health problems associated with involuntary smoking which is not really the chief concern of HB 794, but neither which should be ignored.

However, the majority of taxpaying Montanans who are nonsmokers and considerate smokers don't really like the idea of supplementing their air or food in public areas or at public meetings, with the 4,000 or so chemical compounds contained in tobacco smoke, 90% of which are known poisons or carcinogens, because of the inconsideration of a minority of militant smokers.

Enforcing the Montana Clean Indoor Air Act is not a Republican or Democrat issue. Rather, it is a public health issue that should transcend partisanship or special interest, as it is legally within the interests of the state to be concerned with the health and safety of its people.

Rather than beat the dead horse of noncompliance into oblivion, the legislation in HB 794 is intended to free from pollution the very air that people breathe and falls clearly within the exercise of even the most traditional concept of civil authority and states' rights.

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1 Nebbia v. New York, 291 U.S. 502, 537 (1934)

2 _____, Antismoking Legislation, F. Cal. L.R. _____ 185, (1974)

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Testimony for House Bill 794--Indoor Clean Air

My name is David Maughan, and I represent myself. I live in Helena, Montana at 1516 Broadway. I testify for HB 794.

Presently I work in the Air Quality Bureau for the State Department of Health. Last summer 16 of approximately 20 Air Quality Bureau workers signed a petition to have the Bureau posted as a Non-Smoking area as many other state agencies and bureaus are. But our bureau chief would take no action. This winter with a new Air Quality Bureau chief many of us asked to have portions of the work area designated non-smoking--again no action.

I tried to work within the system but asking our division administrator and then the deputy department director did not help. Our administrator said we'd have to allow smokers an hour off so they could smoke. Both our deputy director and department director smoke, so I didn't expect them to offer much assistance, although the Deputy Director said he'd look into the problem. My bureau chief, Hal Robbins, will not take any action because he says he has no authority.

In the Air Quality Bureau I work in a carrel which has 6-foot-high walls. It affords no protection against cigarette smoke, nor is the building ventilation adequate to carry any smoke away. I even run a fan to try to drive the smoke away, but it is not effective. I go home evenings with headaches and clothes smelling of cigarette smoke. It is inconceivable to me, after writing health effects sections relative to Butte's high lung cancer rates--which are mostly resultant from cigarette smoking and secondarily to other factors--that our Air Quality Bureau will do nothing to protect the health of its workers.

On a practical basis the State Health Department and the Air Quality Bureau, which are charged with protecting human health, will do nothing with the present bill that is in effect now. Some enforcement penalty is necessary before the State Health Department will do anything to protect worker health.

Sincerely,

David Maughan

David Maughan

VISITORS' REGISTER

HOUSE [illegible] COMMITTEE

BILL [illegible] Date 2-20-

SPONSOR [illegible]

| NAME | RESIDENCE | REPRESENTING | SUPPORT | OPPOSE |
|---|---|---|---|---|
| Gaylon B Olson | Helena | DHES | ✓ | |
| Steve BALAZS | " | Montana Lung Assn. | ✓ | |
| Anna B. Jones | " | " " " | ✓ | |
| Kenneth Snoozy | " | DHES | ✓ | |
| Pastor Gary Jones | " | Self | ✓ | |
| Bill Kennedy | " | M.T.A + Self | | ✓ |
| Bob Durkee | " | MTA | | ✓ |
| Bill Kenny | " | Self - MTA | | ✓ |
| Janice Fallan | " | Montana Chamber | | ✓ |
| Brian Ziss | Helena | Mt. Med. Assn | ✓ | |
| JT Lowney | " | " " " | ✓ | |
| David MacLean | Helena, Mt. | self and family | ✓ | |

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PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

Form CS-33
1-81

47TH LEGISLATIVE SESSION

COMMITTEE ON PUBLIC HEALTH, WELFARE & SAFETY

| HOUSE BILL NO. | ENTERED COMM. | DATE CONSIDERED | OUT OF COMM. | DO PASS DATE | DO NOT PASS DATE | DO PASS AS AMEND. DATE | BE CONCURRED IN DATE | BE CONC. IN AS AMENDED DATE | BE NOT CONCURRED IN DATE |
|---|---|---|---|---|---|---|---|---|---|
| HB 794 | 3-4 | 3-18,24 | 3-24 | | | | | | 3-24 |
| HB 797 | 3-4 | 3-25 | 3-25 | | | | | | 3-25 |
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Use a separate sheet for Senate, House Bills, and Resolutions.

HOUSE BILL NO. 794

INTRODUCED BY ELLERD, HARPER, McBRIDE, CONN, WALDRON, DOZIER, WINSLOW, ANDREASON, BERGENE

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE THE PUBLIC HEALTH LAWS RELATING TO CLEAN INDOOR AIR; ~~PROVIDING FOR--ADDITIONAL--ENFORCEMENT;~~ PROVIDING PENALTIES; AMENDING SECTIONS 50-40-103, AND 50-40-104, ~~AND 50-40-108~~, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 50-40-103, MCA, is amended to read:

"50-40-103. Definitions. As used in this part, the following definitions apply:

(1) "Department" means the department of health and environmental sciences provided for in Title 2, chapter 15, part 21.

(2) "Enclosed public place" means any indoor area, room, or vehicle used by the general public or serving as a place of work, including but not limited to restaurants, stores, offices, trains, buses, educational or health care facilities, auditoriums, arenas, and assembly and meeting rooms open to the public.

(3) "Establishment" means an enterprise under one roof that serves the public and for which a single person, agency, corporation, or legal entity is responsible.

(4) "Person" means an individual, partnership, corporation, association, political subdivision, or other entity.

~~(4)~~(5) "Smoking" or "to smoke" includes the act of lighting, smoking, or carrying a lighted cigar, cigarette, pipe, or any smokable product.

(6) "Smoking area" means a designated area in which smoking is permitted.

~~(5)~~(7) "~~Working--area~~" "Place of work" means an enclosed room where more than one employee works."

Section 2. Section 50-40-104, MCA, is amended to read:

"50-40-104. Designation or reservation of smoking or nonsmoking areas -- notice. (1) Except for those enclosed public places provided for in 50-40-105, the proprietor or manager of an enclosed public place shall:

(a) designate nonsmoking areas with easily readable signs; or

(b) reserve a part of the public place for nonsmokers and post easily readable signs designating a smoking area; or

(c) designate the entire area as a smoking area by posting a sign that is clearly visible to the public stating this designation.

(2) The proprietor or manager of an establishment containing enclosed public places shall post a sign in a



THIRD READING

conspicuous place at all public entrances to the establishment stating, in a manner that can be easily read and understood, whether or not areas within the establishment have been reserved for nonsmokers."

~~NEW SECTION.~~ ~~Section 3. Stricter regulation of smoking permitted. (1) A local governmental entity may adopt local ordinances or other regulations that provide regulation of smoking that is more strict than that provided in this part.~~

~~(2) Nothing in this part prohibits proprietor groups, including but not limited to restaurant, hotel, or hospital associations, from imposing stricter regulation of smoking upon their members.~~

~~Section 4. Section 50-40-108, MCA, is amended to read:~~

~~"50-40-108. Enforcement. The provisions of this part shall be supervised and enforced by the local boards of health under the direction of the department.~~ ~~(1) The city attorney or county attorney in whose jurisdiction a violation of this part is alleged to have occurred or the attorney general shall file a complaint in the appropriate court for an injunction, a criminal penalty as provided in [section 5], or both, upon receipt of an affidavit of any person alleging a violation of this part.~~

~~(2) If the city attorney, county attorney, or attorney general fails to file a complaint as provided in subsection~~





~~(1) within 30 days after receipt of an affidavit alleging a violation of this party a person may file a complaint seeking a civil penalty as provided in [section 5] and recover his costs and reasonable attorney's fees if he prevails.~~"

NEW SECTION. Section 3. Penalties. ~~(1)~~ A person who ~~knowingly, as defined in 45-2-101,~~ violates the provisions of this part is guilty of a misdemeanor and is subject to a fine of not more than $25.

~~(2) A person who purposely, as defined in 45-2-101, violates the provisions of this part is guilty of a misdemeanor and is subject to a fine of not more than $50 for the first offense and not more than $100 for each subsequent offense.~~

~~(3) If the city or county attorney or the attorney general fails to enforce this part as provided in [section 4], a person who violates any provision of this part is subject to a civil penalty not to exceed $100.~~

Section 4. Codification instruction. ~~Sections~~ SECTION 3 ~~and 5 are~~ IS intended to be codified as an integral part of Title 50, chapter 40, part 1, and the provisions of Title 50, chapter 40, part 1, apply to ~~sections~~ SECTION 3 ~~and 5~~.

-End-

MINUTES OF THE MEETING
PUBLIC HEALTH, WELFARE AND SAFETY COMMITTEE
MONTANA STATE SENATE

MARCH 18, 1981

The meeting of the Public Health, Welfare and Safety Committee was called to order by Senator Bill Norman in the absence of both the chairman and vice chairman on Wednesday, March 18, 1981 at 12:30 in Room 410 of the State Capitol Building.

ROLL CALL: All members were present except Senators Hager and Himsl who were both excused and arrived late. Senator Jan Johnson also arrived late. Kathleen Harrington, staff researcher, was also present.

CONSIDERATION OF HOUSE BILL 701: Representative Cal Winslow of district 65, sponsor of House Bill 701, gave a brief resume of the bill. This bill is an act to revise the physical therapy licensing law by providing for compensation for board members; to clarify the qualifications of an applicant; to detail the application requirements; to provide for rulemaking authority regarding applicants licensed in other states; to allow a lapsed license to be reinstated by payment of unpaid renewal fees or a late renewal fee, or both; and to provide guidelines and rulemaking authority for issuance of a temporary license. Representative Winslow stated that perhaps this bill should have a statement of intent and if so he would give it to the secretary.

This bill revises the physical therapy licensing law. Section 1 provides for a $25 a day compensation for board members.

Section 2 changes the qualifications for a license. The applicant must pass a written examination prescribed by the board and may have an oral interview if the board feels that it is necessary.

Section 3 outlines the requirements for filing an application for license. These are:

1) payment of a fee
2) three affidavits of good character
3) recent photograph
4) verification of instruction and graduation of a board approved physical therapy school
5) the application must be filed in 45 days prior to the exam. If the applicant fails he may take another exam within 6 months upon payment of a fee.

Clinical labs in this state are not licensed by the Department. This is a complex and complicated procedure with no benefit to anyone and it will cost more money. He then urged the Committee to vote a BE NOT CONCURRED IN for House Bill 735.

With no further opponents, the meeting was opened to a question and answer period from the Committee.

Representative Winslow closed by saying that this bill would bring about the highest quality of accreditation.

CONSIDERATION OF HOUSE BILL 794:

Representative Bob Ellerd of District 75, chief sponsor of House Bill 794, gave a brief resume of the bill. This bill is an act to generally revise the public health laws relating to clean indooor air, providing penalties and amending sections 50-40-103, and 50-40-104. Initially this bill was drafted to put the enforcement power into the public health laws relating to clean indoor air. The amended bill simply changes several definitions in the law, adds a provision that a smoking area must be designated by a sign that is visible to the public, and provides a $25 fine for violation of the act.

Pastor Gary Jensen of the 7th Day Adventist Montana Conference, stood in support of the bill. He stated that that this bill is not anti business or anti tavern. Most people in business are not complying with the present law. This must be enforced otherwise the law is a mockery. Rev. Jensen stated that people and business that are not enforcing this law are just plain being obstinate.

Doug Olson, representing the DHES as their attorney, stood in support of the bill. Mr. Olson stated that the Department of Health would like for the Committee to clarify Section 50-40-108, MCA, by amending House Bill 794. The proposed language in the amendments sought by the Department omits the language in existing Section 50-40-108, which indicates that the Department of Health "directs" emforcement of the Clean Indoor Air Act by local boards of health. This concept is objectionable to some of the larger local departments of health for they believe that the Department should not direct and supervise their activities but rather provide consultation to them in the enforcement of health laws. Mr. Olson also stated that the department would like to see the bill amended to delegated to the city and county attorneys and the Attorney General enforcement of this act. Allowing the general public to request enforcement will help insure compliance in those areas which health department officials do not usually inspect as part of their licensing responsibilites. To

require that these officials act upon affidavits, which are sworn declarations, will discourage the filing of unmeritorious complaints.

Vern Sloulin, representing the Department of Health and Environmental Sciences, stated that their is no funding available to enforce this law. He stated that his department has mailed copies of the law to the local health units and also to all motels, hotels, taverns, and retaurants in Montanat. Mr. Sloulin also stated that the department has done deveral service announcements on the radio and T.V.

Wil Selser of the Lewis and Clark County Health Department stated that this is a very worthwhile bill. He also stated that he concurs with the amendments and also the testimony presented by the Department of Health.

Hal Harper, co-sponsor of the bill, from district 30, stated that if you have ever traveled on a plane you would definitely be in favor of this bill. Most people like clean air. Each person should be entitled to the same rights as the other.

Jerry Loendorf, representing the Montana Medical Association, stood in support of the bill.

With no further proponents, Chairman Hager called on the opponents.

Don Larsen, representing the Montana Tavern Owners Association, stood in opposition to the bill. Mr. Larsen owns and operates Jorgenson's Holiday Inn in Helena. Mr. Larsen stated that he has resisted any attempt to comply with this law because he was not sure just what the law really was. He had written to the department and it took 18 months to find out what he was really supposed to do. He felt that this was just another unenforceable law of this state.

Phil Dunlap, representing the Clonial Inn of Helena, stated is opposition to the bill. Mr. Dunlap stated that he does not feel that in the hospitality business that one can dictate to the public.

Tom Maddox, executive director of the Montana Association of Tobacco and Candy Distributors, stated that his organization respectfully requested that House Bill 794, be not concurred in. The House Committee considering this bill voted to kill it by a small margin. On the final vote of 100 House members the bill passed with 53 votes. Mr. Maddox stated that he felt that there is substantail compliance with this throughout the

state. House Bill 794 would trigger thousands of dollars in litigation.

Bob Durkee, representing the Montana Tavern Association, stood in opposition to the bill.

With no further opponents the meeting was opened to a question and answer period from the Committee.

Senator Johnson asked who is going to pay the fine the operator of the establishment or the people doing the smoking in the no smoking area.

Sentor Himsl stated that he did not feel that the bill could pass until this language is cleared up.

Senator Berg asked if other states have passed a law such as this. Both Colorado and Minnesota have passed a law such as this.

Senator Johnson asked a representative from the department why it took so long for Mr. Larsen to receive a repy to his question. Senator Johnson was told that Mr. Larsen did not inquire until of February of 1981.

In closing Representative Eller stated that if this can work in other states then it can work in Montana. Some people cannot be around smoke at all for health reasons. Rep. Ellerd read a letter from the Colonial Inn stating that they could not comply. He responded by saying that everyone can comply if only they want to. This bill should be passed as a courteousy to everyone. Everyones rights should be considered.

ANNOUNCMENTS: The next meeting of the Public Health, Welfare and Safety Committee will be on Friday, March 20, 1981 at 12:30 in 410 of the State Capitol Building.

ADJOURN: With no further business the meeting was adjourned.

eg

CHAIRMAN, TOM HAGER

ROLL CALL

PUBLIC HEALTH, WELFARE & SAFETY COMMITTEE

47th LEGISLATIVE SESSION - - 1981 Date Feb. 18

| NAME | PRESENT | ABSENT | EXCUSED |
|---|---|---|---|
| Tom Hager | ✓ | | |
| Matt Himsl | ✓ | | |
| S. A. Olson | ✓ | | |
| Jan Johnson | ✓ | | |
| Dr. Bill Norman | ✓ | | |
| Harry K. Berg | ✓ | | |
| Michael Halligan | ✓ | | |
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Each day attach to minutes.

HB 794

Introduced by Rep. Ellerd

Initially this bill was drafted to put enforcement power into the public health laws relating to clean indoor air. The amended bill simply changes several definitions in the law, adds a provision that a smoking area must be designated by a sign that is visible to the public, and provides a $25 fine for violation of the act.

DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES
LEGAL DIVISION

TED SCHWINDEN GOVERNOR

COGSWELL BUILDING

STATE OF MONTANA

(406) 449-2630

HELENA MONTANA 59620

March 18, 1981

Senate Public Health Committee
47th Legislature (1981 Session)
State Capitol
Helena, Mt 59620

Dear Members of the Committee:

The Department of Health and Environmental Sciences respectfully requests that the Senate Public Health Committee amend House Bill 794, as passed by the Montana House of Representatives. This Bill introduced by Representative Ellerd, et al, seeks to amend the Montana Clean Indoor Air Act, Sections 50-40-101, et seq., MCA.

Section 50-40-108, MCA, provides for enforcement of this Act and it was proposed to be amended in Section 4 of the bill as originally introduced in the House. The present law leaves enforcement of this Act up to local boards of health under the direction of the Department of Health. As the photocopies of newspaper articles on this Act during the past two years which have been distributed to the Committee will show, there has been uncertainty over the specific enforcement sanctions intended by the legislature for violation of the Act. Representative Ellerd's proposed amendments to the Act which provide for a petty misdemeanor penalty of not more than $25 for a violation will clarify this aspect of the Act. Who or how one can initiate enforcement is, however, still unclear.

The Department of Health, with the support of some of the local departments of health, encourges this Committee and the Legislature as a whole to clarify Section 50-40-108, MCA, by amending House Bill 794 as the attached proposed amendments provide. The specific amendment to Section 50-40-108, MCA, as proposed in subsection (1) of the original bill which the Department essentially supports was not objected to by anyone who testified before the House Public Health Committee on this bill as originally proposed, by members of the Committee during Executive Session, or in the House debate on second reading. The proposed language in the amendments sought by the Department today omits the language in existing Section 50-40-108, which indicates that the Department of Health "directs" enforcement of the Clean Indoor Air Act by local

boards of health. This concept is objectionable to some of the larger local departments of health for they believe that the Department should not direct and supervise their activities but rather provide consultation to them in the enforcement of health laws.

In addition, since HB 797 proposes to amend the Clean Indoor Air Act to provide for a small criminal penalty for violations of the Act (up to $25), enforcement of the Act should be delegated by the Legislature to the city and county attorneys and the Attorney General, as the elected law enforcement officers of the public. Allowing the general public to request enforcement will help insure compliance in those areas which health department officials do not usually inspect as part of their licensing responsibilities. To require that these officials act upon affidavits, which are sworn declarations, will discourage the filing of unmeritorious complaints.

Proposed amendment No. 3 in the Department's list relating to clarification of Section 50-40-104, MCA, for establishments housing both a restaurant and a tavern, was requested by the Tavern Association before the House Public Health Committee. The Department has no objection to this proposed amendment and would encourage the Senate Public Health Committee to give it favorable consideration.

Thank you for your consideration of these amendments.

Sincerely,

Douglas B. Olson

Douglas B. Olson
Counsel for Department

DBO:mac

House Bill 794
47th Legislature

March 18, 1981

Senate Public Health Committee

Proposed Amendments to HB 794 Offered by the
Department of Health and Environmental Sciences

1. Amend title
   Title, line 8
   following: "50-40-103"
   Strike: "~~,~~ AND"
   Insert: ","

2. Amend title
   Title, line 8
   following: "50-40-104"
   Insert: ", AND 50-40-108"

3. Page 3, line 3
   Insert: "(3). THE PROPRIETOR OR MANAGER OF AN ESTABLISHMENT CONTAINING BOTH A RESTAURANT AND A TAVERN, IN WHICH SOME PATRONS CHOOSE TO EAT THEIR MEALS IN THE TAVERN, IS NOT REQUIRED BY THIS PART TO POST A SIGN DESCRIBED IN SUBSECTION (2) IN THE TAVERN AREA OF THE ESTABLISHMENT."

4. Page 4, line 14
   Insert: Section 3. Section 50-40-108, MCA, is amended to read:
   "50-40-108. Enforcement. ~~The provisions of this part shall be supervised and enforced by the local boards of health under the direction of the department.~~ THE CITY ATTORNEY OR COUNTY ATTORNEY IN WHOSE JURISDICTION A VIOLATION OF THIS PART IS ALLEGED TO HAVE OCCURRED, OR THE ATTORNEY GENERAL SHALL FILE A COMPLAINT IN THE APPROPRIATE COURT FOR AN INJUNCTION, A CRIMINAL PENALTY AS PROVIDED in Section 4, or both, upon receipt of an affidavit from an official of the department or local health department, or any person alleging a violation of this part."

Gt. Falls Tribune 5/25/80

# Smoking-law awareness 'fair,' county health agency reports

Tribune Capitol Bureau

HELENA — A Lewis and Clark City-County Health Department survey of licensed establishments indicates a "fair degree of awareness" of the new state Clean Indoor Air law.

About one-third of the establishments surveyed were aware of the law, which was enacted by the 1979 Legislature. Slightly fewer than half of the establishments that were aware of the law had posted signs, but many said they planned to do so. And many establishments that weren't aware of the law were willing to comply or to find out more about the law.

The law requires managers of enclosed public places to:

— designate non-smoking areas with easily readable signs, or

— reserve a part of the public place for non-smokers and post easily readable signs designating a smoking area, or

— designate the entire area as a smoking area.

The manager must also post a sign at public entrances stating whether or not areas within the establishment have been reserved for non-smokers.

In addition, "no smoking" signs must be posted in all elevators, museums, galleries, kitchens and libraries of any establishment doing business with the public.

The only exemptions to the clean indoor air law are restrooms, taverns where meals are not served and vehicles or rooms seating six or fewer members of the public.

The purpose of the law is to "protect the health of non-smokers in public places and to provide for reserved areas in some public places for those who choose to smoke."

The Lewis and Clark County survey was just of establishments inspected by the Health Department, including hotels, motels, food processors, restaurants and grocery stores.

Seventy-five establishments were selected at random. Seventeen taverns were exempt, leaving 58 establishments in the final sample, covering Helena, Lincoln, East Helena, Augusta and other rural areas of the county.

To the question "Are you aware of the law?" 35 percent said yes, 31 percent said no, and the rest were closed or refused to reply.

Sixteen percent said they had a sign posted, 50 percent said they did not, and 35 percent were closed or refused to reply.

Forty-five percent of those aware of the law had signs and 55 percent did not.

Sixty-two percent of those without signs said they would consider placing a sign or finding out about the law, 10 percent said they would not, and 28 percent were unsure.

Vernon Sloulin, chief of the state food and consumer safety bureau, which is in charge of enforcing the law, says a place has been added to the inspection form for inspectors of licensed establishments to note compliance with the law. And he has asked the Department of Administration, which inspects elevators, to check for "no smoking" signs in elevators.

His bureau was given no money to enforce the law, "so we've been trying to do it by media and by visiting the public establishments that we have licensed through local health departments," Sloulin said. Some local health departments have taken it upon themselves to visit some of the many other public places not licensed by them, he said.

## *anada, United States reach tanding' on gas price*

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sand cubic feet Feb. 17. U.S. energy officials said the increase came too quickly and temporarily put the price of Canadian gas out of line with heat- oil in the United States.

nde, Duncan and their officials ussed the importance of the laska Highway natural gas gh Canada. Duncan said is an "urgent prior- States.

e of our natural id. "It is just ould not go d not get er 48

# Butte restaurants indicate they plan non-smoking area

The Montana Clean Indoor Air Act apparently is stirring some Butte restaurant owners to designate non-smoking areas, even though such areas are not mandatory.

The law, to "protect the health of non-smokers in public places," only requires restaurant owners to post a sign telling whether they have non-smoking areas. The law is difficult to enforce because there are no penalties for not complying.

According to an informal poll by The Montana Standard, Terri's restaurant opened ...ix-seat non-smoking section in its dining ...m two weeks ago.

The Amalgamated Copper Co., Gheonn's and the War Bonnet Inn have plans to designate such sections.

The Acoma Lounge, Ramada Inn, Dilly's, Black Angus and Lydia's do not have non-smoking sections. The Ramada Inn tries to seat non-smokers away from smokers, even though it has not designated a section.

Several managers said smoke generally is cleared from the air quickly enough by ventilation to protect non-smokers.

Health Department Sanitarian Don McLean said there are no special requirements about what can constitute a non-smoking section. A restaurant could pick any area of its seating for non-smokers.

The law does prohibit smoking in elevators, museums, galleries, kitchens and libraries.

Hospitals must try to keep smoking and non-smoking patients separate, and must provide a non-smoking section in waiting rooms.

M. Standard 1/23/80

**Butte district court roundup**

BTM 1-21-80

# Indoor clean air act is lacking enforcement

HELENA (AP) — Montana's Clean Indoor Air Act has been on the books for more than six months but it is not being enforced and may not be until some specific penalties for violators are approved by the Legislature.

The new law requires restaurants and other businesses to post signs indicating whether they have areas set aside for non-smokers

Health inspectors are beginning to take surveys of the level of compliance with the law but only warnings will be issued to violators, said Vern Sloulin, chief of the state Food and Consumer Safety Bureau.

The Legislature apparently counted on voluntary compliance and did not provide specific penalties for violations. And compliance has been slow.

Sloulin, whose bureau oversees enforcement of the law by sanitarians in 30 local health districts throughout Montana, said restaurants, motels and hotels were mailed copies of the law in December. He said sanitarians who make unannounced health code compliance inspections at least twice a year will begin making note of whether the law is being self-enforced.

Sloulin said the law now is innocuous. He said the Department of Health and Environmental Sciences has not decided whether to propose any amendments.

Stephen Balazs, program consultant for the Montana Lung Association which provides no-smoking signs without charge, said it is accurate to say most businesses are not in compliance.

Exempt from the act are restrooms, taverns or bars where meals are not served and vehicles or rooms seating six or fewer persons.

Helena Independent Record 1/21/80

# Clean Indoor Air Act unenforced

HELENA (AP) — Montana's Clean Indoor Air Act has been on the books for more than six months but it is not being enforced and may not be until some specific penalties for violators are approved by the Legislature.

The new law requires restaurants and other businesses to post signs indicating whether they have areas set aside for non-smokers.

Health inspectors are beginning to take surveys of the level of compli-

## ...ntain Bell tops PSC's ...laint, inquiry list

The area where most of the com... ...ts originated was PSC District 5, ...ern Montana, where 284 ... This district includes ...ead counties and ...st. The sec... ...m Dis... ...ies

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Daily Order - Lake 1/21/80

# Clean air act not being enforced

HELENA (AP) — Montana's Clean Indoor Air Act has been on the books for more than six months but it is not being enforced and may not be until some specific penalties for violators are approved by the Legislature.

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Exempt from the act are restrooms, taverns or bars where meals are not served and vehicles or rooms seating six or fewer persons.

# Clean Indoor Air Act: I.R. 1-20-80

The Montana Lung Association is passing out these signs, and others, to businessmen who want to establish no smoking areas.

## *Putting the bite on offenders using a law without any teeth*

By DAVID CONLEY
IR Staff Writer

Montana's Clean Indoor Air Act has been in effect for more than six months, but no one has been cited for violating the act despite the fact that violators abound.

That probably won't change soon.

Vern Sloulin, chief of the state Food and Consumer Safety Bureau, says health inspectors are beginning to take surveys of the level of compliance with the law, but first they will give warnings to violators.

The new law simply requires restaurants and other businesses to post signs indicating whether they have areas set aside for non-smokers.

The problem in insuring enforcement is that the Legislature, apparently counting on voluntary compliance, did not provide specific penalties for violators.

For any number of reasons, compliance has been slow. The only way compliance can be forced is under general state health statutes. This means a violator would have to be taken through the cumbersome process of court proceedings.

Sloulin, whose bureau oversees enforcement of the new law by sanitarians in 30 local health districts in the state, said restaurants, motels and hotels were mailed copies of the law in December.

"I know ignorance of the law is no excuse, but now that they know (about the law) we'll see whether they comply."

Sloulin said sanitarians, who make unannounced health code compliance inspections at least twice a year, will begin making note of whether the law is being self-enforced.

An informal Independent Record survey this week of a number of establishments indicate some businesses are complying with the law, but many are not.

At least one state legislator is understood to be considering putting teeth in the law during the next Legislative session by proposing fines for non-compliance.

Doug Olson, staff attorney for the state Department of Health and Environmental Sciences, said it's now up to county attorneys and the state attorney general to take violators of the act to court.

"A restraining order would have to be sought under the general state health laws," Olson said.

In other states, police or health officers can levy fines by writing tickets and offenders must appear in local courts.

Sloulin, who said the department has not decided whether to propose any amendments, described the law as innocuous.

**"Most businesses aren't sure how the law will be enforced. It's largely unenforceable"**

Unlike laws in other states, it doesn't require businesses to set aside smoking areas. It only requires that they inform the public whether or not they have a non-smoking areas.

Also, businesses do not have to pay for the signs — the Montana Lung Association, which has offices in Helena at 825 Helena Ave. provides them free of charge.

Stephen Balazs, program consultant for the Lung Association, says he has had a good response for the signs.

But he said it would be fair to say most businesses are not in compliance.

"Most businesses aren't sure how the act will be enforced. It's largely unenforceable."

Clark Myers, a sanitarian for the Lewis and Clark City-County Health Department, said: "I'll probably be explaining the law for a while longer before I start citing anyone. It's something that requires a little education and explanation."

He said he could not estimate the level of compliance with the ordinance, but added there appears to be a "surprisingly large amount" of businesses which have posted the signs.

The act states proprietors of "enclosed public places" must either post signs designating non-smoking areas, reserve areas for non-smokers or designate the entire area as a smoking area.

An enclosed public place is defined as "any indoor area, room or vehicle used by the general public or seving as a place of work, including but not limited to restaurants, stores, offices, trains, buses, educational or health care facilities, auditoriums, arenas, assembly and meeting rooms."

Also, no smoking signs must be placed in elevators, museums, galleries, kitchens and libraries.

Exempt from the act are restrooms, taverns or bars where meals are not served and vehicles or rooms seating six or less people.

# No smoking law only smoldering locally

By SALLY HILANDER
IR Staff Writer

Non-smokers won a victory when the Montana Legislature passed the "Clean Indoor Air Act," but in Helena the law is off to a lukewarm start. The act, which took effect July 1, requires that restaurants, stores, offices and other public places post signs telling non-smokers whether or not they will find a no-smoking section within.

Such signs are noticeably lacking around the city so far.

The law also prohibits smoking in elevators, museums, public kitchens and libraries. And visitors and patients in hospitals and medical clinics must now have permission to smoke.

Montana's Clean Indoor Air Act is a watered-down version of an earlier proposed law which would have required no-smoking sections in restaurants and other public places.

In its adopted form, the act is "educational," says Clark Myers, a sanitarian for the Lewis and Clark City-County Health Department, which is charged with administering the law on the local level.

"It's a neat little act which started out as a much more healthy bill, but it didn't survive very well," Myers commented. "It has a lot to say because maybe it's the beginning of a better bill."

Myers said his office will begin cracking down on tthe sign requirement after the public has time to get used to it. "After all, people deserve to live in the environment they started out in."

In Helena, Safeway has taken the lead among stores with its new sign: "No part of this sales area of this store has been reserved for non-smokers."

**NO PART OF THIS SALES AREA**

**OF THIS STORE HAS BEEN**

**RESERVED FOR NON-SMOKERS.**

Sign on the door at local Safeway store

A spokesman for the supermarket giant, Jerry LeRoy of Butte, said the sign seemed the most logical answer to the new law.

"We considered no-smoking, but that's very difficult to enforce. We didn't want our food clerks running up and down the aisles telling people to put out their cigarettes.

"And it seemed kind of ridiculous to say you can smoke in that section, but not in this section," LeRoy added. "It seemed more appropriate to make smoking optional."

The Safeway spokesman added: "My personal feeling is I'd rather people didn't smoke in the stores."

A few restaurant managers in Helena are oblivious to the fledgling law. "When does it go into effect?" asked Doug Pope, manager of Bert and Ernie's. "I'm not aware of it.'"

Pope said he'll "have to think about it," but expects the business will eventually offer a few no-smoking tables. "Im certainly not going to tell all my clients they can't smoke in here. That would be suicide.

"I'm sure it's a good law. I have nothing against it myself," Pope added.

Others are acquainted with the law but don't like it. "I think it's ridiculous," commented a man who answered the phone at Jorgensen's Holiday Inn. He would not identify himself. "I lobbied against it for six years."

He said he has "no idea what we're going to do and I don't think the health department knows what they're going to do. We've had no notification at this point."

The man contends he receives "very few" customer requests for no-smoking sections. "There are three tables of people out there now and someone's smoking at all of them."

And Fred Wong Jr. of Yat Son Chinese Restaurant says his business offers a no-smoking option but doesn't approve of the state mandating it.

"If a customer's offended by smoke, you don't need a law to tell you to offer them a no-smoking table," Wong said. "It's just good business."

A non-smoker himself, Wong says "people have the right not to be forced to sit next to someone who smokes.

"But there are already so many regulations and red stape for small business. The government is trying to step in too much."

The Village Inn Pancake House has had good response to its no-smoking section, said kitchen manager Robert Halstead. He said the dining room hostess asks all customers if they wish to smoke.

"A lot of Christians eat here and a lot of them don't smoke," Halstead commented. "Most Christians don't smoke."

Of 10 other Helena restaurants contacted in a random sample, not one had a section for non-smokers. One of them apologized and two volunteered to accommodate requests for smoke-free dining.

NAME: VERNON SHOWLIX DATE: 3/18/81

ADDRESS: HELENA

PHONE: 449-2408

REPRESENTING WHOM? DEPT. HLTH & ENV SCS.

APPEARING ON WHICH PROPOSAL: H. R. 794

DO YOU: SUPPORT? ✓ AMEND? ✓ OPPOSE? _____

COMMENTS: _____

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: Will F. Selsee DATE: 3-17-81

ADDRESS: 122 - 12th Ave. Helena

PHONE: 443 - 1010 Ext 351

REPRESENTING WHOM? Lewis & Clark Co. Health Dept.

APPEARING ON WHICH PROPOSAL: H.B. 794

DO YOU: SUPPORT? ✓ AMEND? ✓ OPPOSE? _____

COMMENTS: In support of proposed amendments from St. Health Dept.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: D W Lamm DATE: 3/15/91

ADDRESS: 150 19th Ave.

PHONE: 442-7254

REPRESENTING WHOM? MFA, J. Inglima

APPEARING ON WHICH PROPOSAL: 794

DO YOU: SUPPORT?_____ AMEND?_____ OPPOSE? /

COMMENTS:

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

NAME: THOMAS M. MADDOX DATE: 18 MARCH 1981

ADDRESS: 17 W. NINTH AVE. (FOR MAIL DELIVERY)
P.O. BOX 123
HELENA MT 59624

PHONE: 442-3555 OR 442-1582

REPRESENTING WHOM? MONTANA ASSOCIATION OF TOBACCO AND CANDY DISTRIBUTORS, INC

APPEARING ON WHICH PROPOSAL: H-B 794

DO YOU: SUPPORT? _____ AMEND? _____ OPPOSE? ✓

COMMENTS: ATTACHED

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY.

I'm Tom Maddox, executive director for the Montana Association of Tobacco and Candy Distributors, officed in Helena.

Our organization respectfully requests that the House Bill 794 be not concurred in.

The House committee considering this bill voted to kill HB794.

The majority committee vote was overturned on the floor by a small margin. On the final vote of 100 house members the bill passed with 53 votes.

~~In the committee~~ (continuing with NEWSLETTER ATTACHED)

Montana Association of
# Tobacco and Candy Distributors

INFORMATION BULLETIN

9 MARCH 1981

Citizens and small business establishments in Montana are suffering from a buildup of regulations and paperwork that the growing bureaucracy loaded onto our backs in the 1960s and 1970s. With the 1980s, candidates for the presidency and for the Montana legislature recognized the mushrooming burden which consumed time and money at the expense of productivity. With high hopes that their candidates would keep their promises, voters elected a new president and the 1981 Montana legislature.

President Reagan continues to pursue a course which appears aimed at lifting the burden government has placed on people's backs. Both the Montana House of Representatives and Senate have killed scores of bills which they determined not necessary. Commendably, legislators in general introduced only a fraction of the numbers of bills which past legislatures had to cope.

However, there are still far too many bills in committees. There just is not all that much wrong with the state of Montana that needs correcting. We continue high hopes that the "second" chamber in considering the bills received from the "first" chamber will carefully scrutinize and continue to kill proposals which we do not need.

In the 1970s the legislature in Montana consistently killed a version of a smoking restriction bill as it was introduced---that is, until 1979. The '79 version bore the vote-getting title of the Montana Clean Indoor Air Act. The title is misleading; a falsehood. The 1979 act requests operators of public places to post signs which inform visitors or customers that smoking is permitted on the posted premises, or that smoking is not permitted.

In the first 18 months of the act, informative signs appeared all over the state in public places. This was a good response. Most are courteously complied with. Legislators were told that the 1979 act was the foot in the door--the camel's nose under the tent: that those who seek to put tobacco smokers in their place, or to purge them from society, would be back in 1981, demanding more power.

In the 19th month of the original act, we learned a bill to demand more was on its way to introduction. ~~and the bill~~ became Montana House Bill 794.

HB 794 proposed that Montana cities and counties enact ordinances or other regulations to restrict smoking that are more strict that the state law. This is bad legislation and this section was withdrawn.

Executive Director Tom Maddox, P. O. Box 1 2 3, Helena, MT 59601 • Telephone (406) 442-1582

HB 794 proposed that the cities' attorneys, counties' attorneys and the state attorney general shall take offenders to court and demand "a criminal penalty" upon receipt of a complaint "of any person alleging a violation of this part". HB 794 further provided that if any of these law enforcement officers fails to act within 30 days, such official would be "subject to a civil penalty". Further HB 794 provided that if any person prevailed in convicting such official, the complaining person could recover his court costs and reasonable attorney's fees. Originally, HB 794 provided that these officials prosecute and if conviction resulted the fine would be as little as $25. All of this was considered bad legislation by business people, and, a majority of legislators accepted withdrawal of all of the foregoing by sponsors --- except the $25 fine.

With the $25 fine still in HB 794, 53 of the 100 member House passed HB 794 to the Senate February 25th. At this writing, HB 794 is in the Senate Public Health Committee awaiting setting for public hearing.

The 1979 "Clean Indoor Air Act"is serving the purpose of reminding tobacco smokers to be considerate of nonsmokers, among those who may need reminding. We are impressed by the increasing numbers of courteous tobacco smokers. For the few who will not smoke courteously, a $25 fine assessable on the operator of a public place will not solve any discourteous infraction by one customer or visitor.

A $25 fine on a business person is on the old course of governmental harrassment triggered by a third party in many cases.

A $25 fine is not cost effective legislation. It can't begin to meet the cost of today's litigation. Worse, it could trigger thousands of dollars in court costs in an attempt for clarification of many vague or obtuse references which leave the act open to varying interpretations.

We believe that a majority of Montana's 50 senators will vote that HB 794 is bad legislation -- unnecessary legislation -- harrassment of small business operators, and that the 1979 act on tobacco smoking is serving its purpose; that it will provide antismokers satisfaction if allowed more time than just 20 months or so.

---

DATE _____

COMMITTEE ON _____

VISITORS' REGISTER

| NAME | REPRESENTING | BILL # | Check One: Support | Check One: Oppose |
|---|---|---|---|---|
| Helen Jurgenson | Physical Therapy Licensing Board | 701 | ✓ | |
| Douglas Oppe | Mt. Dept. Health & ES | 794 | ✓ w/ amend | |
| Douglas Oppe | " " " " | 735 | | ✓ |
| Roger M Elmer | " " " " | 754 | ✓ | |
| Roger M Elmer | " " " " | 735 | | ✓ |
| Warren E. Brass | " " " " | 735 | | ✓ |
| Gary Ames | The Associated Press | — | — | — |
| Jan Maddox | MT. Assn. of Realtors & Canon Distributors | 794 | | ✓ |
| Will A. Coben | L+C Co. Health Dept. | 794 | ✓ | |
| Vern Skowlund | Dept. Health & ES | 794 | ✓ | |
| Judy Olson | Mt Nurses Assoc | 734 | | — |
| Sister Gary Lewis | Mt. Conference of Seventh-day Adventists | 794 | ✓ | |
| Ted Larson | M.T.A. | 794 | | ✓ |

(Please leave prepared statement with Secretary)

DEPARTMENT OF HEALTH AND ENVIRONMENTAL SCIENCES
LEGAL DIVISION

TED SCHWINDEN, GOVERNOR

COGSWELL BUILDING

STATE OF MONTANA

(406) 449-2630

HELENA, MONTANA 59620

March 20, 1981

Senate Public Health Committee
47th Legislature (1981 Session)
Capitol Building
Helena, MT 59620

Re: House Bill 794

Dear Senator:

Your committee on Wednesday, March 18, 1981, heard testimony on House Bill 794, proposed amendments to the Montana Clean Indoor Air Act, Title 50, Chapter 40, MCA, sponsored by Representative Ellerd. I was requested to respond to the question of who would be subject to the proposed misdemeanor sanction when a person was found to be smoking in a posted non-smoking area, the individual smoking or the proprietor? I should not have attempted to answer the question without referring to the complete Act. As a result, I believe my answer was incorrect and confusing.

The existing Montana Clean Indoor Air Act and the proposed amendments place no direct requirements or prohibitions on the individual smoker. A person who desires to smoke may do so in an area posted as "No Smoking" pursuant to this Act without being subjected to the penalties of this Act. This is not to say that a smoker may be subject to sanctions if he smokes in areas posted "No Smoking" which are under the jurisdiction of the State fire marshall such as near gasoline pumps and storage tanks.

An affirmative duty under the Montana Clean Indoor Act is only placed upon the proprietor or manager of an establishment defined in the Act to indicate by posting a sign whether or not provisions have been made for non-smokers in the building under his control. It is my opinion that if someone were to smoke in an area designated "No Smoking" or "Reserved for Non-Smokers Only", pursuant to this Act, neither the smoker nor the proprietor would be subject to the proposed $25 fine. The only person subject to a fine would be a manager or proprietor who did not post one of the signs required by Section 50-40-104, or Section 50-40-105, MCA.

AN EQUAL OPPORTUNITY EMPLOYER

House Bill 794
47th Legislature

March 18, 1981

Senate Public Health Committee

Corrected
Proposed Amendments to HB 794 Offered by the Department of Health and Environmental Sciences

1. Amend title
   Title, line 8
   following: "50-40-103"
   Strike: ", AND"
   Insert: ","

2. Amend title
   Title, line 8
   following: "50-40-104"
   Insert: ", AND 50-40-108"

3. Page 3, line 3
   Insert: "(3). THE PROPRIETOR OR MANAGER OF AN ESTABLISHMENT CONTAINING BOTH A RESTAURANT AND A TAVERN, IN WHICH SOME PATRONS CHOOSE TO EAT THEIR MEALS IN THE TAVERN, IS NOT REQUIRED BY THIS PART TO POST A SIGN DESCRIBED IN SUBSECTION (2) IN THE TAVERN AREA OF THE ESTABLISHMENT."

4. Page 4, line 14
   Insert: Section 3. Section 50-40-108, MCA, is amended to read:
   "50-40-108. Enforcement. ~~The provisions of this part shall be supervised and enforced by the local boards of health under the direction of the department.~~ THE CITY ATTORNEY OR COUNTY ATTORNEY IN WHOSE JURISDICTION A VIOLATION OF THIS PART IS ALLEGED TO HAVE OCCURRED OR THE ATTORNEY GENERAL SHALL FILE A COMPLAINT IN THE APPROPRIATE COURT FOR AN INJUNCTION, A CRIMINAL PENALTY AS PROVIDED IN [SECTION 4], OR BOTH UPON RECEIPT OF AN AFFIDAVIT OF AN OFFICIAL OF THE DEPARTMENT OR LOCAL HEALTH DEPARTMENT, OR ANY PERSON ALLEGING A VIOLATION OF THIS PART.

I apologize for any confusion I may have caused and I am available for any additional questions you may have on the Montana Clean Indoor Air Act. As I stated at the hearing, our Department is not advocating a specific sanction for violation of the Act. Our interest is that Section 50-40-108, MCA, relating to enforcement, be clarified to reflect the relationship between the Department and local health departments and boards relative to enforcement and to clearly articulate in the statute that it is and always has been the responsibility of elected public officials such as the city attorney, county attorney and attorney general to enforce laws which provide for criminal penalties. Thank you.

Sincerely,

Douglas B. Olson

Douglas B. Olson
Counsel for Department

DBO:mac

MINUTES OF THE MEETING
PUBLIC HEALTH, WELFARE AND SAFETY COMMITTEE
MONTANA STATE SENATE

MARCH 24, 1981

The meeting of the Public Health, Welfare and Safety Committee was called to order by Chairman, Tom Hager, on Tuesday, March 24, 1981 at 12:30 in Room 410 of the State Capitol Building.

ROLL CALL: All members were present. Senators Himsl, Norman, and Halligan arrived late. Kathleen Harrington, Staff researcher, was also present.

DISPOSITION OF HOUSE BILL 646: Representative Ann Mary Dussault in the sponsor of HB 646. This bill is an act to revise and clarify the state laws relating to child day-care facilities; to clarify the rulemaking authority of the Department of Health and Environmental Sciences; to require registration of family day-care homes; to provide a penalty for failure to comply.

The amendments proposed by Senator Dover were reviewed. Senator Johnson stated that she like the amendments proposed by Senator Dover as they would make it affect only those homes which are taking care of children which recieve day-care payments from either state or federal funds.

A motion was made by Senator Johnson to adopt the Dover amendments.

Senator Berg stated that the COmmittee had an obligation to protect the public.

Senator Himsl stated that the parents have the first responsibility.

A Roll Call Vote was made on the motion of Senator Johnson. Motion carried. (See attachments.)

The amendments proposed by Representative Dussault were reviewed.

A motion was made by Senator Halligan to accept amendment number 1 which would change the number requirements of homes which care for children. Motion carried.

A motion was made by Senator Johnson to accept amendment #2 which is the penalty clause being deleted. Motion carried with all Senators voting "yes" except Senators Halligan and Berg who voted "no".

DISPOSITION OF HOUSE BILL 794: Representative Bob Ellerd is the sponsor of House Bill 794. This is an act to generally revise the public health laws relating to clean indoor air; providing penalties.

Senator Norman stated that he would like to see the bill made clear as to who it is addressing either the business or the person smoking.

Kathleen gave a report on some amendments to take care of that problem.

A motion was made by Senator Norman that the bill be amended to address the business which is in violation of the law and not the person smoking. Motion carried.

Senator Olson asked the Department of Health if the county or city attorney does not prosecute the business in violation because of a conflict of interest, who will handle the matter then in that case. It was reported that the Attorney General's Office will then handle the matter. However, it is optional for them to do so.

A motion was made by Senator Johnson on Page 3, following line 4, to insert the following: "(3) The proprietor or manager of an establsihment containing both a restaurant and a tavern, in which some patrons choose to eat their meals in the tavern, is not required by this part to post a sign described in subsection (2) in the tavern area of the establishment". Motion carried.

A motion was made by Senator Johnson that HB 794 BE NOT CONCURRED IN, as amended. Motion carried. (See attachments)

DISPOSITION OF HOUSE BILL 566: Representative Andrea Hemstead is the sponsor of House Bill 566. This bill is an act to define electrology to mean removal of superfluous hair with an electrified need and to require a cosmetology license for the removal of superfluous hair by a means other than electrology.

A motion was made by Senator Halligan that HB 566 be amended to strike the part requiring a cosmetology license for the removal of superfluous hair by a means other than electrology; and also to strike Section 1 on Page 1, line 21. Motion carried.

ROLL CALL

PUBLIC HEALTH, WELFARE & SAFETY COMMITTEE

47th LEGISLATIVE SESSION - - 1981 Date March 24

| NAME | PRESENT | ABSENT | EXCUSED |
|---|---|---|---|
| Tom Hager | ✓ | | |
| Matt Himsl | Late | | |
| S. A. Olson | ✓ | | |
| Jan Johnson | ✓ | | |
| Dr. Bill Norman | Late | | |
| Harry K. Berg | ✓ | | |
| Michael Halligan | Late | | |
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Each day attach to minutes.

# STANDING COMMITTEE REPORT

MARCH 24, 19 81

MR. PRESIDENT:

We, your committee on PUBLIC HEALTH, WELFARE & SAFETY

having had under consideration HOUSE Bill No. 794

ELLERD (HAGER)

Respectfully report as follows: That HOUSE Bill No. 794

third reading copy be amended as follows:

1. Page 3,
Following: line 4.
Insert: "(3) The proprietor or manager of an establishment containing both a restaurant and a tavern, in which some patrons choose to eat their meals in the tavern, is not required by this part to post a sign described in subsection (2) in the tavern area of the establishment."

2. Page 4, lines 7 and 8.
Following: "45-2-101,"
Strike: "violates the provisions of this part"
Insert: "fails to designate or reserve a smoking or non smoking area in their establishment as provided for in 50-40-104"

~~DO PASS~~
And, as so amended, BE NOT CONCURRED IN

TOM HAGER Chairman.

STATE PUB. CO.
Helena, Mont.

HOUSE BILL NO. 794

INTRODUCED BY ELLERD, HARPER, McBRIDE, CONN, WALDRON, DOZIER, WINSLOW, ANDREASON, BERGENE

A BILL FOR AN ACT ENTITLED: "AN ACT TO GENERALLY REVISE THE PUBLIC HEALTH LAWS RELATING TO CLEAN INDOOR AIR; ~~PROVIDING FOR--ADDITIONAL--ENFORCEMENT;~~ PROVIDING PENALTIES; AMENDING SECTIONS 50-40-103, AND 50-40-104, ~~AND 50-40-108~~, MCA."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 50-40-103, MCA, is amended to read:

"50-40-103. Definitions. As used in this part, the following definitions apply:

(1) "Department" means the department of health and environmental sciences provided for in Title 2, chapter 15, part 21.

(2) "Enclosed public place" means any indoor area, room, or vehicle used by the general public or serving as a place of work, including but not limited to restaurants, stores, offices, trains, buses, educational or health care facilities, auditoriums, arenas, and assembly and meeting rooms open to the public.

(3) "Establishment" means an enterprise under one roof that serves the public and for which a single person, agency, corporation, or legal entity is responsible.

(4) "Person" means an individual, partnership, corporation, association, political subdivision, or other entity.

~~(4)~~(5) "Smoking" or "to smoke" includes the act of lighting, smoking, or carrying a lighted cigar, cigarette, pipe, or any smokable product.

(6) "Smoking area" means a designated area in which smoking is permitted.

~~(5)~~(7) "Working--area" "Place of work" means an enclosed room where more than one employee works."

Section 2. Section 50-40-104, MCA, is amended to read:

"50-40-104. Designation or reservation of smoking or nonsmoking areas -- notice. (1) Except for those enclosed public places provided for in 50-40-105, the proprietor or manager of an enclosed public place shall:

(a) designate nonsmoking areas with easily readable signs; or

(b) reserve a part of the public place for nonsmokers and post easily readable signs designating a smoking area; or

(c) designate the entire area as a smoking area by posting a sign that is clearly visible to the public stating this designation.

(2) The proprietor or manager of an establishment containing enclosed public places shall post a sign in a



REFERENCE BILL

conspicuous place at all public entrances to the establishment stating, in a manner that can be easily read and understood, whether or not areas within the establishment have been reserved for nonsmokers."

(3) THE PROPRIETOR OR MANAGER OF AN ESTABLISHMENT CONTAINING BOTH A RESTAURANT AND A TAVERN, IN WHICH SOME PATRONS CHOOSE TO EAT THEIR MEALS IN THE TAVERN, IS NOT REQUIRED BY THIS PART TO POST A SIGN DESCRIBED IN SUBSECTION (2) IN THE TAVERN AREA OF THE ESTABLISHMENT.

~~NEW SECTION. Section 3. Stricter regulation of smoking permitted. (1) A local governmental entity may adopt local ordinances or other regulations that provide regulation of smoking that is more strict than that provided in this part.~~

~~(2) Nothing in this part prohibits proprietor groups, including but not limited to restaurant, hotel, or hospital associations, from imposing stricter regulation of smoking upon their members.~~

~~Section 4. Section 50-40-108, MCA, is amended to read:~~

~~"50-40-108. Enforcement. The provisions of this part shall be supervised and enforced by the local boards of health under the direction of the department. (1) The city attorney or county attorney in whose jurisdiction a violation of this part is alleged to have occurred or the attorney general shall file a complaint in the appropriate~~





~~court for an injunction, a criminal penalty as provided in [section 5], or both, upon receipt of an affidavit of any person alleging a violation of this part.~~

~~(2) If the city attorney, county attorney, or attorney general fails to file a complaint as provided in subsection (1) within 30 days after receipt of an affidavit alleging a violation of this party a person may file a complaint seeking a civil penalty as provided in [section 5] and recover his costs and reasonable attorney's fees if he prevails."~~

NEW SECTION. Section 3. Penalties. ~~(1)~~ A person who ~~knowingly, as defined in 45-2-101, violates the provisions of this part~~ FAILS TO DESIGNATE OR RESERVE A SMOKING OR NONSMOKING AREA IN THEIR ESTABLISHMENT AS PROVIDED FOR IN 50-40-104 is guilty of a misdemeanor and is subject to a fine of not more than $25.

~~(2) A person who purposely, as defined in 45-2-101, violates the provisions of this part is guilty of a misdemeanor and is subject to a fine of not more than $50 for the first offense and not more than $100 for each subsequent offense.~~

~~(3) If the city or county attorney or the attorney general fails to enforce this part as provided in [section 4], a person who violates any provision of this part is subject to a civil penalty not to exceed $100.~~

Section 4. Codification instruction. ~~Sections~~ SECTION 3 ~~and 5 are~~ IS intended to be codified as an integral part of Title 50, chapter 40, part 1, and the provisions of Title 50, chapter 40, part 1, apply to ~~sections~~ SECTION 3 ~~and 5~~.

-End-